

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

JOANN WRIGHT HAYSBERT,

Plaintiff,

v.

BLOOMIN' BRANDS, INC., AND
OUTBACK STEAKHOUSE OF FLORIDA,
LLC,

Defendants.

CIVIL ACTION NO.
4:20cv121

TRANSCRIPT OF PROCEEDINGS

DAY 5

Norfolk, Virginia

August 14, 2023

BEFORE: THE HONORABLE REBECCA BEACH SMITH
United States District Judge

APPEARANCES:

CRANDALL & KATT

By: David A. McKelvey

And

HAYSBERT & MOULTRIE LLP

By: Nazareth M. Haysbert

Counsel for the Plaintiff

1 APPEARANCES CONT'D:

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3 McGAVIN, BOYCE, BARDOT, THORSEN & KATZ, P.C.
4 By: John D. McGavin
Emily Blake
Counsel for the Defendants
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1 (Hearing commenced at 11:00 a.m.)

2 THE CLERK: In case number 4:20cv121, JoAnn Wright
3 Haysbert versus Bloomin' Brands, Inc., and Outback
4 Steakhouse of Florida, LLC.

5 Mr. McKelvey, Mr. Haysbert, is the plaintiff ready
6 to proceed?

7 MR. HAYSBERT: Yes, Your Honor.

8 THE COURT: Good morning.

9 MR. HAYSBERT: Good morning.

10 THE CLERK: Mr. McGavin, is the defendant ready to
11 proceed?

12 MR. MCGAVIN: Yes.

13 Good morning, Your Honor. John McGavin and Emily
14 Blake on behalf of the defendants. Ray Graham of Outback
15 Steakhouse is seated at counsel table. Thank you.

16 THE COURT: Good morning to counsel and Mr. Graham.
17 Good morning, Dr. Haysbert.

18 Counsel, before we proceed into the first matter
19 before the Court, let me mention a couple of things or ask a
20 question. When I got the new forms, because the case was
21 scheduled to only go through Friday, and we were going over
22 into this week, there were new electronic equipment
23 authorization forms, basically for the same equipment as we
24 had before.

25 But I noticed, Mr. Haysbert, that there was yet

1 another trial tech, that Mr. Bingham is now gone, so this
2 would be the third we had or been listed. Now there is a
3 Brian D. Coleman. Could you please introduce him to the
4 Court.

5 MR. HAYSBERT: Yes, Your Honor. Mr. Coleman. This
6 is the owner of N2 Trial, the company that Kevin Bingham was
7 working for. He is a local person, and he will be working
8 with us, if the Court would allow.

9 THE COURT: The Court will allow. I don't know
10 that you're going to need a computer right now, but he's
11 welcome to sit at the counsel table with you as did
12 Mr. Bingham.

13 MR. HAYSBERT: Thank you very much, Your Honor.

14 THE COURT: The next matter that I would mention to
15 you is that the jury was instructed last night on their
16 recording by the jury clerk that they would not need to
17 report today, but they should report, unless they heard
18 otherwise, at 11:00 a.m. tomorrow morning, so we are not
19 holding up a jury.

20 I looked at all of these issues, and we've worked
21 on them all weekend the best we can with there being
22 hundreds and hundreds and hundreds of pages that we tried to
23 go through of materials and notes. But it's just not fair
24 to keep holding up a jury. So they were instructed not to
25 come today, and they were instructed to call in tonight and

1 expect to come, if they are instructed, or they have been
2 instructed to come at 11:00 a.m. tomorrow morning unless
3 otherwise told this evening.

4 But, in any event, the jury is not here today, but
5 they are still instructed to be here, unless otherwise
6 noticed, at 11:00 a.m. tomorrow morning.

7 MR. MCGAVIN: Your Honor, may Ms. Blake be allowed
8 to step out and notify our witnesses? I'm not sure if they
9 are here yet, but we have two witnesses that were scheduled
10 to be here.

11 THE COURT: Yes, she may notify them. We are going
12 to take these issues one by one, and we have at least first
13 the issue of process service that occurred on Friday. Then
14 we have the issue of mistrial, the issue of the motion to
15 revoke Mr. Haysbert's *pro hac vice* status, then we have
16 admissibility of work orders, and we have Dr. Filler's
17 testimony and remedial measures. There is just so many
18 things that we have to discuss, and by judging how we've
19 proceeded so far, the Court believes it will take most of
20 the day, if not all of today, to go through these matters.

21 MR. MCGAVIN: Thank you. She will step out at the
22 appropriate time, and thank you for the permission.

23 THE COURT: She can do it now if you want her to.

24 MR. MCGAVIN: I think I had told them to get here a
25 bit later because we were expecting -- so I think they are

1 not scheduled until about noon, so we will look at the clock
2 and step out then. Thank you.

3 THE COURT: It's five after 11:00.

4 MR. MCGAVIN: Thank you, Your Honor.

5 THE COURT: Let's start with the motion to quash
6 the witness subpoenas. I did receive the motion, the
7 written motion, and have reviewed it, and I received your
8 affidavit, Mr. Haysbert. I don't understand, at a threshold
9 level, something that you put now under oath in your
10 affidavit, which is contrary, in the Court's opinion, to
11 what was represented to the Court on Friday evening.

12 In your affidavit you're now saying that you didn't
13 start the process until 9:00 a.m. Eastern Daylight Time, and
14 specifically on Friday night you said 6:05, and you said
15 Eastern Daylight Time, or at least I know I responded, well,
16 you said you sent it to California, and I responded, that
17 would be 3:00 in the morning Pacific Time, and you said yes.

18 So I would like for you to explain that. This is
19 yet another time when it's very muddy. I can't imagine
20 somebody telling the Court they did it at 6:05 when they did
21 it at 9:00 a.m., because there is a lot of difference
22 between being up at 6:05 and doing something and doing it at
23 9:00 a.m. So would you please explain.

24 MR. HAYSBERT: Yes, Your Honor. My apologies for
25 inadvertent mistake.

1 THE COURT: An inadvertent mistake? When you look
2 at that transcript and see how many times we went over 6:05
3 and 3:00 a.m. and direct questions, but go ahead and explain
4 how it was an inadvertent mistake.

5 MR. HAYSBERT: Sure. So what I meant, Your Honor,
6 was 6:00 a.m. Pacific Standard Time, which would be 9:00
7 a.m. here. So I just got a little confused about the
8 timing. But, no, 6:00 a.m. Pacific Standard Time, 9:00 a.m.
9 here, and that information is also reflected in the e-mail
10 that I sent, and the declaration I forwarded to the Court
11 yesterday.

12 THE COURT: It is, but you did specifically
13 represent to the Court, because this was of great concern to
14 the Court that subpoenas were going out on the same day
15 after we had been through the subpoena issue before, and it
16 was clear that you had to do it 14 days in advance, and we
17 went through all of that. We went through all of that at
18 the conference on August 1st, if not certainly when I did
19 not quash Mr. Seifert's subpoena on a motion to quash
20 because it wasn't timely.

21 So you knew the time, did you not? You are aware
22 now of the 14-day time limit, and you were when you asked
23 those subpoenas to be served on Friday; is that correct?

24 MR. HAYSBERT: Your Honor --

25 THE COURT: Is that correct?

1 MR. HAYSBERT: Well, it needs explanation.

2 THE COURT: I said, "Is that correct?"

3 MR. HAYSBERT: Your Honor, I would like to get on
4 the record, please.

5 THE COURT: Sir, I want you to answer is that
6 correct, and then you can explain.

7 MR. HAYSBERT: I spoke with counsel, Norman Thomas,
8 and according to counsel Norman Thomas, you can serve a
9 subpoena within the 14-day period, and it is still an
10 operative, active subpoena. It is up to the Judge to decide
11 whether the Judge wants to waive or not the 14-day rule.
12 But there is no requirement that an attorney cannot under
13 any circumstances serve a subpoena within the 14-day rule.
14 They can. It is simply up to the Judge to decide from there
15 whether the Judge will either allow it or not. And you did
16 so with Nick Seifert, and we attempted it again.

17 THE COURT: Well, Mr. Thomas is not an attorney in
18 this case.

19 MR. HAYSBERT: He is my consultant, Your Honor.

20 THE COURT: Mr. Thomas is not an attorney in this
21 case, and you should be seeking advice from your local
22 counsel, as far as the Court is concerned. If you seek
23 advice from other counsel, you still had been told by the
24 Court that it was 14 days. We will find out how this all
25 evolved when we have this hearing today.

1 So if I'm understanding, you just inadvertently
2 told the Court 6:05 when you really meant 9:00 a.m., and
3 Mr. Thomas advised you that you could serve a subpoena at
4 any time, and then it was up to the Court to decide whether
5 the Court should allow it to go forward; is that correct?

6 MR. HAYSBERT: My understanding, yes, is that you
7 could serve it within the 14-day period, and it's up to the
8 Court to waive it for good cause.

9 THE COURT: But I want you to know two things that
10 are of concern to the Court. When you serve a subpoena, the
11 judge's name is on that subpoena, and the Court's name is on
12 that subpoena. As you mentioned earlier, you even served
13 one on your expert witness because you thought, well, she's
14 not a lawyer, she won't know.

15 MR. HAYSBERT: That is not correct, Your Honor.

16 THE COURT: I'm going from my memory of what we
17 went through there. So all I'm telling you is that my
18 recall with Dr. Haider was that you served a subpoena on
19 her, you represented it to the Court, and you said, well,
20 she's not a lawyer, she might have come anyway. That's my
21 recall, and we went through that.

22 The concern with the Court is the Court's name, the
23 Judge's name and the court is on that subpoena, and a lot of
24 lay people don't understand that it's not coming from the
25 Court. They just don't understand. You admitted that

1 yourself on the record, and the record will reflect that.
2 So let's go forward. I'm telling you it's a concern of the
3 Court that we had gone through a number of times the 14-day
4 requirement of this court and this court's local rules.

5 Mr. Thomas may be speaking from -- I don't know
6 what he is speaking from, but there was no asking for a
7 waiver of our local rules. Our local rules specifically say
8 that, and you, as a *pro hac vice* attorney, have to follow
9 our local rules, as does Mr. McKelvey as a member of the bar
10 of this court.

11 Our local rules specifically say it. The Court had
12 reiterated it to you on numerous occasions. We already went
13 through it with Mr. Seifert, and because you said it was
14 crucial to your case, I went ahead and said he's local and
15 we will let him in. In the meantime, you made a
16 representation to the Court about Dr. Haider that, well, you
17 went ahead and subpoenaed her because she wasn't a lawyer
18 and maybe she would come anyway. So it may not be word for
19 word, but that is what occurred in this court.

20 MR. HAYSBERT: Your Honor, she was never served
21 with the subpoena.

22 THE COURT: You said you sent her one. You said
23 you mailed her a subpoena. We knew she couldn't be served,
24 because she was more than a hundred miles away. I'm not
25 going to debate it anymore. This just keeps happening

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1 repeatedly, Mr. Haysbert.

2 Now, we will call the process server now unless
3 there is something anybody wants to say. Do you want to
4 argue your motion to quash or do you want to hear the
5 process server first?

6 MR. MCGAVIN: Your Honor, I'd prefer to hear the
7 process server, and then any additional legal argument in
8 addition to what we've already submitted, we'll present.

9 THE COURT: Then, is there anything you want to add
10 other than your affidavit?

11 MR. HAYSBERT: Not at this time, Your Honor.

12 THE COURT: We will hear the process server, and
13 then we will go from there. I think the process server is
14 outside. Can you see that he or she, whoever it is, is in.

15 Ma'am, if you would please come forward and be
16 sworn and take the witness stand.

17 (Witness was sworn.)

18 CAROL DONALDSON, called by the Plaintiff, having
19 been first duly sworn, was examined and testified as
20 follows:

21 DIRECT EXAMINATION

22 BY THE COURT:

23 Q. The Court is going to ask you some questions, and the
24 attorneys will have the option also. So if you could please
25 state your name to the Court.

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1 A. Carol Donaldson.

2 Q. Ms. Donaldson, did you serve a subpoena on a Mr. Wilson
3 on Friday?

4 A. Yes. Not personally, no.

5 Q. Who did?

6 A. No, I mean I didn't serve him personally, I served it on
7 the manager.

8 Q. Well, let me go to that. I saw that. What was the
9 person's name? It was a Devon Stansel?

10 A. Devon Stansel.

11 Q. And did you ask for Mr. Wilson?

12 A. Yes. He wasn't there. I think he was here. I don't
13 know. But he wasn't there.

14 Q. You thought he was here?

15 A. Well, I think the manager might have told me that he had
16 been in court. I'm not sure, but he wasn't there, so -- and
17 we didn't have another address for him, so our only option
18 was to serve the manager.

19 Q. All right. So when you went to the address that you had,
20 was it an Outback Steakhouse?

21 A. Yes, ma'am.

22 Q. And you served a Devon Stansel, the manager?

23 A. Yes.

24 Q. And Mr. Wilson wasn't there?

25 A. Yes.

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1 Q. And you understood that he was in court anyway?

2 A. That's what I think the manager told me, that he was
3 aware of the trial, aware that Mr. Wilson was having to deal
4 with this, and he thought he had been in court. But this was
5 later. I served it 5:25 p.m., so it was later. So if he
6 would have had a shift, I went there later. If he had a
7 shift that night, he would be there, but he wasn't.

8 Q. When did you receive the request to serve Mr. Wilson?

9 A. On Friday.

10 Q. Pardon?

11 A. On Friday, that same day.

12 Q. Approximately what time?

13 A. Around 2:00, 1:00 or 2:00.

14 Q. So around 1:00 or 2:00 on Friday you received the request
15 to serve the subpoena?

16 A. Yes, ma'am.

17 Q. And who gave you that request?

18 A. The company that I was working with, BFRM Legal Support
19 Services.

20 Q. All right. And so you got the request around 2:00?

21 A. Maybe 1:00. You know, it was early afternoon. If I had
22 my phone, I could tell you exactly, but I don't have my
23 phone.

24 Q. That's all right. It was after 12 noon?

25 A. I believe so.

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1 Q. I believe is not going to do.

2 A. Pardon?

3 Q. Believe is not going to do. You need to have at least
4 some idea of when you got this.

5 A. It was afternoon. I'm just looking for like -- see if I
6 got an e-mail or something. I printed out the e-mail so I
7 can tell you exactly. Okay. It was around noontime because
8 I went to Office Max and printed this stuff up because I
9 couldn't go back to my office. So -- and I did that at
10 12:32. So it was around noontime that she called me and
11 asked me to serve him.

12 Q. Who is "she"?

13 A. Her name is Bree, and she's the contact person I have at
14 BFRMS Legal Support Services.

15 Q. So you said you went to Office Max at 12:32. So it was
16 12:32 when you picked up all this paperwork?

17 A. When I printed them.

18 Q. When you did what?

19 A. When I printed the subpoena so I could serve them,
20 because my office is all the way back in Ocean View, so to
21 save time, I went to Office Max and printed everything so I
22 didn't have to go back to my office.

23 Q. How did you get the fees that --

24 A. I work with this company. I advanced the fees for them.
25 Is that what you mean?

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1 Q. Yes. You gave I believe 104 -- what was it, \$142.40?

2 A. Yeah. That was the check that I wrote out of my business
3 account. I advanced this company, BFRM, the fees, the
4 witness fees.

5 Q. And that included attendance and mileage?

6 A. Yeah. That's what my understanding is, that it includes
7 a \$40 witness fee plus mileage. Every check is different.

8 Q. I understand, but how do you calculate the mileage?

9 A. I think -- well, Bree calculated it for me, show me
10 exactly what to pay them, and I think she goes by \$0.65 a
11 mile from the distance of the courthouse to --

12 Q. I'm just asking you. So she told you what mileage to
13 put?

14 A. Right. Yes, ma'am. She told me exactly how much to
15 write the check for.

16 Q. When did you provide Mr. Haysbert with the proof of
17 service?

18 A. Well, see, I haven't really dealt with him except for him
19 asking me to come today. All my dealings have been with
20 Bree, you know, with BFRM Legal Solutions. So she sent me a
21 proof to sign, and I e-mailed it back to her. So she is like
22 the middle person between me and the attorney.

23 Q. So what time did you e-mail it back to Bree?

24 A. Well, it was after I got home, which was probably 7 or
25 8:00, because I was doing all this up until then. So I had

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1 them here, but as far as the time --

2 Q. Well, you were out in the field, is what you're saying?

3 A. Yes, ma'am. So I'd say it was probably around 7:00 Bree
4 sent me these proofs to sign -- to review and sign, which I
5 did, and then I e-mailed them back to her. And I assume at
6 that point she e-mailed them to the attorney.

7 Q. All right. So we'll make the proof of service that you
8 have with you Court Exhibit Number 1 for this hearing.

9 A. Okay. I have one for Mr. Wilson.

10 THE COURT: Let's just stick with Mr. Wilson now.

11 (Court Exhibit 1 received in evidence.)

12 THE COURT: We will go to Ms. Eleftherion in a
13 moment.

14 BY THE COURT:

15 Q. I am saying for now, we will get these later before you
16 leave, but the completed proof of service that you have
17 executed, I know there's a copy on record, but I want the one
18 that she has -- copy that came, I believe on Sunday, to the
19 Court with some filings. But I want the one that
20 Ms. Donaldson actually did.

21 A. I have the original one right here.

22 Q. All right. Now, can you please provide the Court with a
23 timeline of Ms. Eleftherion's subpoena. When did you get
24 that request, and when did you serve it?

25 A. Okay. I got the request on Thursday.

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1 Q. On Thursday.

2 A. And served it on Friday.

3 Q. You served it on Friday. So the request was Thursday,
4 and you served it on Friday. What time did you serve it on
5 Friday?

6 A. I believe it was 1:55 p.m.

7 Q. All right. And where did you serve it?

8 A. I served it at Outback Steakhouse, too, and it's -- the
9 address --

10 Q. Who did you serve it to?

11 A. I served it to her manager, Thomas Bird. Now, he did
12 tell me that she was in court.

13 Q. So she was in court because she was in court at that
14 time?

15 A. Yeah.

16 Q. She was at court at that time?

17 A. That's what Mr. Bird told me.

18 Q. So you served that one on Mr. Bird, the manager at an
19 Outback Steakhouse?

20 A. Yes, ma'am.

21 Q. When did you provide Mr. Haysbert with proof of that
22 service?

23 A. Well, I sent the proof when I got back to the office, you
24 know, and Bree sent me -- she filled it out, and I signed it
25 and sent it at the same time I sent Mr. Wilson's, probably

Donaldson, C. - Cross

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1 around 7:00 or 8:00.

2 Q. So, again, you would have sent Mr. Wilson's and
3 Mr. Eleftherion's served subpoenas at the same time?

4 A. Yes, ma'am.

5 Q. Back to the individual named Bree?

6 A. Right. I scanned them and e-mailed them together.

7 THE COURT: That served subpoena will be marked as
8 Court Exhibit 2 for this hearing.

9 (Court Exhibit 2 received in evidence.)

10 THE COURT: Mr. Haysbert, do you have any questions
11 of Ms. Donaldson?

12 MR. HAYSBERT: Yes, I do.

13 CROSS-EXAMINATION

14 BY MR. HAYSBERT:

15 Q. Just one classifying question for you, Ms. Donaldson.
16 First of all, thank you for coming and taking time out of
17 your schedule. I appreciate that very much. So with respect
18 to Alicia Eleftherion, I heard you say earlier that you
19 served -- you received a trial subpoena for her on Thursday
20 of last week?

21 A. Yeah.

22 Q. Did you receive the subpoena for her the same time that
23 you received the one for Marcus?

24 A. No. It was sent to me last minute on Friday, Marcus'.

25 Q. Okay. All right. And you received the one for Alicia

Donaldson, C. - Cross

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1 earlier in time?

2 A. Right.

3 Q. Okay. Who did you receive that from?

4 A. You know what -- okay. I'm sorry. Ask that question
5 again.

6 Q. Who did you receive Alicia Eleftherion's subpoena from?

7 A. Bree at BFRM Legal Support Services. And I'm sorry. I
8 was incorrect. It was another person that I served, too, and
9 I got her paperwork on Thursday. I got the paperwork for
10 Marcus Wilson and Alicia Eleftherion at the same time on
11 Friday, I apologize.

12 MR. HAYSBERT: No problem. No further questions,
13 Your Honor.

14 THE COURT: So you got them both from Bree around
15 12:32, I think you said --

16 THE WITNESS: Yes. On Friday.

17 THE COURT: This is very important. These dates
18 and times are extremely important.

19 THE WITNESS: That's right. I went to Office Max,
20 and I printed up hers and his.

21 THE COURT: Any questions you have, Mr. McGavin?

22 MR. MCGAVIN: Yes, Your Honor.

23 CROSS-EXAMINATION

24 BY MR. MCGAVIN:

25 Q. Who did you serve on Thursday, whose paperwork?

1 A. The paperwork that I got for service on Thursday was for
2 a Deajah Clark.

3 Q. All right. And when did you serve her?

4 A. Friday. But I got the paperwork on Thursday.

5 Q. But what time on Friday?

6 A. I served her at her restaurant. It was another Outback
7 Steakhouse -- or Roadhouse restaurant. I served her around
8 the same time, around 12:30 or around noontime, and I served
9 a manager as well for her. I think she was in court too.

10 Q. And for what days to appear?

11 A. I don't -- maybe I do have those. I think it was like 9
12 through 14 or 11 through 14.

13 Q. Is it correct that you served a subpoena on Marcus
14 Wilson's manager on Friday after close of business to appear
15 on Friday, August 11th?

16 A. I don't think so. I'm not sure because I don't have the
17 subpoena in front of me, but -- well, actually -- I can tell
18 you exactly what it says. Just give me a minute. Date and
19 time, August 11th and August 14th, 2023, 10:00 a.m. to 6:00
20 p.m.

21 Q. As a process server, are you in the habit of serving
22 people after close of business to appear in court after the
23 court closes?

24 A. Well, as a process server, I do what the attorneys ask me
25 to do unless -- I guess I would know it was really against

1 the rules. But it said 11 through 14. A lot of times I have
2 to serve people after close of business. I mean, most of the
3 time I have to serve people in the evenings and on Saturdays.

4 THE COURT: We are not talking about that. We are
5 talking about business hours for court operations, for
6 normal court operations.

7 THE WITNESS: So I don't usually let that -- I
8 don't understand your question.

9 BY MR. MCGAVIN:

10 Q. Well, isn't it true that you were -- that if you see a
11 subpoena that is unenforceable, you won't serve it?

12 A. Well, it didn't just have the 11th. It had the 14th as
13 well, the 11th through the 14th.

14 Q. Do you know that court starts at 10:00, ends at 5:00 or
15 6:00? Do you have any knowledge of these types of things?

16 A. Yes. Of course, I do.

17 Q. So you had no problem taking a subpoena to the manager
18 for Mr. Wilson, knowing he wasn't there, and serving him --

19 A. I didn't know --

20 Q. Let me finish, if you don't mind -- and then serving him
21 after close of business for court?

22 A. Like I said, the dates were of the 11th through the 14th,
23 so I assumed it was for Monday, today. You know, I wasn't
24 privy to all the details. I didn't get to communicate with
25 the attorney. I just -- it seemed like to me that it was for

1 an extension for the court time, that the trial had been
2 extended, and that they needed to give him an additional
3 subpoena.

4 Q. Where did you get that information?

5 A. Like I said, it was an assumption on my part.

6 Q. Did you ever speak to Mr. Haysbert?

7 A. This weekend.

8 Q. What did he tell you?

9 A. He asked me to come today.

10 Q. What else?

11 A. We didn't talk about anything else.

12 Q. Well, did you ask him why he wanted you to serve a
13 subpoena after close of business on a court day on Friday,
14 August 11th? Did you ask him about that?

15 A. No.

16 Q. And in regard to serving a subpoena, does it say August
17 11 through 14 or just August 11 and 14?

18 A. Well, I read it to you exactly how it appears on the
19 subpoena, which I'm sure you have as well. It says, "Date
20 and time, August 11th and August 14th."

21 Q. So "and," not "through," correct?

22 A. Uh-huh.

23 Q. Is that a yes?

24 A. Yes.

25 Q. Thank you. And when you receive this, don't you

Donaldson, C. - Cross

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1 customarily check in with the attorney and ask questions?

2 A. Not necessarily. I think I wasn't dealing directly with
3 the attorneys, but I was dealing with Bree.

4 Q. She's in California?

5 A. She's in California, and she -- we were, you know -- this
6 is all very last minute, and that the attorneys, you know,
7 asked me to go ahead and serve it, and go ahead and serve the
8 managers if I wasn't able to get them individually.

9 Q. And in regard to any question about what you were doing,
10 do you ever raise questions that you might be issuing a
11 subpoena that violates the local rules of the Federal
12 District Court or the state court?

13 A. Well, I didn't think this did.

14 Q. You don't know --

15 A. Because it has the 14th -- no, I don't know.

16 Q. You don't know the court rules, that you have to give 14
17 days in advance of trial?

18 A. Yeah, I know there is dates -- there is limits. There's
19 so many days before trial and stuff you can serve papers.
20 But, you know, they asked me to do this, and so I did it.

21 Q. How much do you get paid for doing that?

22 A. Well, every job is different.

23 Q. How much did they pay you?

24 A. They paid me \$95 per job. That's what I charge.

25 THE COURT: 95 per subpoena or --

Donaldson, C. - Redirect

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1 THE WITNESS: Per subpoena.

2 MR. MCGAVIN: Thank you. Nothing further, Your
3 Honor.

4 THE COURT: I have a question.

5 REDIRECT EXAMINATION

6 BY THE COURT:

7 Q. Do you have Deajah Clark, have you done the proof of
8 service? Do you have that ready?

9 A. No. They haven't sent that to me yet for some reason.

10 Q. Who hasn't sent it to you?

11 A. Bree from the BFRM Legal Support Services.

12 Q. Did you serve it?

13 A. Yes.

14 Q. Did you sign it?

15 A. I haven't signed the actual proof of service for that
16 subpoena, no.

17 Q. Why?

18 A. Because it hasn't been requested. This has all been like
19 very rushed and last minute.

20 Q. What day did you serve the subpoena on -- Mr. Haysbert
21 has come up to the podium again. You don't come up to the
22 podium unless it's time to address the Court, and that is in
23 our rules.

24 You mentioned you had gotten confused because you
25 served another subpoena to Deajah Clark, a manager, and her

1 manager at Outback Steakhouse.

2 A. It wasn't Outback. It was Roadhouse.

3 Q. Excuse me. Roadhouse. When did you do that?

4 A. Friday.

5 Q. So on Friday you also served a subpoena to Deajah Clark?

6 A. Yes, ma'am.

7 Q. When did that command her to be here?

8 A. I believe it was the exact same thing, the 11th and the
9 14th, and they told me that she was in court as well, the
10 manager.

11 Q. We will look into that. But you need to get the process
12 and signed and with this court.

13 A. Okay. I'll hand deliver it, if you want me to.

14 Q. Yes, we do, because there are a number of questions about
15 appearance of witnesses and why they came. So, consequently,
16 yes. What other subpoenas did you serve in this case? The
17 proof of services need to be filed with the Court forthwith.

18 A. I will hand deliver the one for --

19 Q. I'm asking which ones you served.

20 A. I'm looking. Norman Chase.

21 Q. Norman who?

22 A. Chase.

23 Q. What date did you serve that?

24 A. I served him on August 8th.

25 Q. Is that all that you served of this case?

Donaldson, C. - Recross

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1 A. Yes.

2 Q. Well, those proofs of service you may e-mail or contact
3 Bree --

4 A. I have the original for Mr. Chase as well.

5 THE COURT: Then that will be Court Exhibit Number
6 3.

7 (Court Exhibit 3 received in evidence.)

8 BY THE COURT:

9 Q. So you've got them all there except for Deajah Clark?

10 A. Yes, ma'am.

11 Q. Well, you need to get in contact with Bree, or whoever
12 sends these and processes them, and tell them to get it to
13 you forthwith because we need to look at this, and we may
14 have to pursue this further with Ms. Clark. We will see.

15 Anything further for Ms. Donaldson?

16 MR. MCGAVIN: No. Thank you, Your Honor.

17 MR. HAYSBERT: Your Honor, I did have one follow-up
18 question for you, Ms. Donaldson.

19 RECROSS-EXAMINATION

20 BY MR. HAYSBERT:

21 Q. You indicated that you spoke to a manager at Outback
22 Steakhouse in Chesapeake where you served Alicia Eleftherion?

23 A. Yes.

24 Q. And she told you that Alicia was at court, correct?

25 A. He, yes.

1 Q. He told you that Alicia was at court?

2 A. Uh-huh.

3 Q. Then when you served the manager at the Outback
4 Steakhouse on Laskin Road for Marcus Wilson, did she tell you
5 that Marcus Wilson was at court?

6 A. Well, it was a he, and this was later in the day, so he
7 wouldn't have been here. Court could have been closed.

8 Q. What did he tell you?

9 A. He said he knew about the trial and that he would make
10 sure to get this to Mr. Wilson right away.

11 Q. Did he say anything about thinking, believing that
12 Mr. Wilson was in court at the time?

13 A. No. Because it was after court closed.

14 THE COURT: Asked and answered. She's already said
15 the circumstances under which she served Mr. Wilson and the
16 manager.

17 MR. HAYSBERT: Thank you very much.

18 THE COURT: Or the manager for Mr. Wilson.

19 MR. HAYSBERT: No further questions.

20 THE COURT: Anything else, Mr. McGavin?

21 MR. MCGAVIN: No, Your Honor.

22 THE COURT: Then, if you would give the three
23 completed processes.

24 THE WITNESS: Okay. Yeah. You want me to hand
25 deliver the one?

1 THE COURT: Yes. You have given her the completed
2 process of service for Mr. Wilson, Ms. Eleftherion, and
3 Mr. Chase?

4 THE WITNESS: Yes, ma'am.

5 THE COURT: Yes, I would appreciate if you would
6 get the proof of service in for Deajah Clark. If you would
7 contact whoever has it and whatever is going on and ask
8 that -- this is for Norman Chase. Do you have the other two
9 already?

10 THE WITNESS: Somebody took them. I had them here.
11 No? I put them back in here. Yeah.

12 THE COURT: She just handed up Norman Chase, and
13 now we have the proof of service for, I think Marcus Wilson
14 was the first one, we now have that; and Ms. Eleftherion is
15 the second, and we have that; and Mr. Chase was the third,
16 and we have that. Deajah Clark will be hand-delivered to
17 the Court.

18 THE WITNESS: Yes, ma'am.

19 THE COURT: Then the Court, Ms. Donaldson, releases
20 you with the understanding that you will get Deajah Clark's
21 proof of service to the Court, and it would be appreciated
22 if it could get here today.

23 THE WITNESS: Okay.

24 THE COURT: Thank you.

25 (Witness excused.)

Eleftherion, A. - Direct

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1 THE COURT: The Court had the clerk contact
2 Mr. Eleftherion and have her here today, and if you would
3 please go get her from the witness room.

4 Ms. Eleftherion, you are still under oath, and if
5 you will get on the witness stand. The Court has some
6 questions for you.

7 ALICIA ELEFOTHERION, called by the Plaintiff, having
8 been first duly sworn, was examined and testified as
9 follows:

10 DIRECT EXAMINATION

11 BY THE COURT:

12 Q. The questions are limited strictly to what the Court
13 asks, and then the attorneys can ask you other questions.

14 You were contacted by Ms. Armstrong?

15 A. Yes, ma'am.

16 Q. And you have not spoken to the Court or any of the
17 attorneys?

18 A. No, ma'am.

19 Q. I wanted to ask you, why did you come for testimony on
20 Friday morning?

21 A. On Friday morning? I was subpoenaed to come to this
22 court.

23 Q. When? The records show that you weren't served until
24 1:55 p.m.

25 A. I was served a subpoena -- I can't remember the date.

Eleftherion, A. - Direct

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1 THE COURT: Please speak up.

2 THE WITNESS: Yes, ma'am. I was served a subpoena,
3 I don't recall the date, but it said to be in court Tuesday,
4 the 9th, 10th and -- I'm sorry Wednesday the 9th, 10th and
5 11th. I have the original subpoena somewhere. It said to
6 be in court all those days.

7 BY THE COURT:

8 Q. Did somebody serve it on you?

9 A. A few weeks ago, yes, ma'am. It was Mid-Atlantic
10 Professional Services, I think was the name attached to the
11 check, and I was just trying to be in compliance with the
12 subpoena.

13 Q. So you were served with a subpoena for your testimony by
14 Mid-Atlantic?

15 A. I didn't know the lady's name who brought me papers, but
16 it just said, yes, ma'am -- the check said Mid-Atlantic
17 Professional Services. And, yes, I did receive an additional
18 subpoena on Friday when I was already here in court. It came
19 to the restaurant that I work at in Chesapeake, and that was
20 a subpoena for today.

21 Q. So you received a subpoena before court, before the
22 trial, and it said to be here?

23 A. Correct. There was four dates -- four days listed on the
24 original subpoena, which were Tuesday, Wednesday, Thursday,
25 and Friday, it was listed on there. Yes, ma'am.

Eleftherion, A. - Direct

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1 Q. What days did you come to court?

2 A. I came to court on Tuesday morning. I arrived at 9:00
3 a.m. because the subpoena said to arrive at 9:00. I did have
4 additional interactions after that because I wasn't sure
5 where to go, who to speak with, so I did contact that day
6 John McGavin just to ask, after I sat in Court out front for
7 a couple of hours, I went out to my car just to ask if I was
8 doing the right thing because I was unsure. He let me know
9 at that time that they would not get to my testimony that
10 day, but he would try to let me know like what day I would be
11 needed.

12 Q. So it was a subpoena from Mr. McGavin?

13 A. I believe so, yes, ma'am. I believe so.

14 Q. So Mr. McGavin issued a subpoena for you, and you came
15 under his subpoena?

16 A. I believe that is correct, yes, ma'am.

17 Q. Was Mr. Haysbert on the subpoena?

18 A. I'm trying to recall. I don't think so, but, again, I
19 read through to make sure I was in the right place at the
20 right time. I wasn't paying attention to which name was on
21 it. I apologize.

22 Q. Do you have the subpoena?

23 A. It is back at the restaurant, I believe.

24 Q. Well, you will need to get that to the Court.

25 A. Yes, ma'am. Yes, Your Honor.

Eleftherion, A. - Cross

865

1 Q. So you were served by Mid-Atlantic. At the moment we can
2 check with Mr. McGavin if that was his subpoena. Then that's
3 why you came to court?

4 A. On Tuesday, yes, Your Honor.

5 Q. And then you were served again on Friday at 1:55 p.m.
6 after you were already at court?

7 A. That is correct, yes, Your Honor.

8 Q. So you wouldn't have gotten that subpoena until after you
9 had left court?

10 A. That is correct.

11 Q. Did Mr. Haysbert or anyone on his behalf contact you
12 about your testimony?

13 A. No, Your Honor.

14 THE COURT: Any questions, Mr. Haysbert?

15 MR. HAYSBERT: No, Your Honor. Thank you.

16 THE COURT: Any questions, Mr. McGavin?

17 CROSS-EXAMINATION

18 BY MR. MCGAVIN:

19 Q. Mrs. Eleftherion, do you recall that our office notified
20 you that we would be issuing a subpoena for you at
21 approximately a month prior to trial?

22 A. Yes, I do recall. I believe it was through e-mail.

23 Q. Yes.

24 THE COURT: You believe it was what?

25 THE WITNESS: I believe it was through e-mail that

Eleftherion, A. - Cross

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1 I saw the contact e-mail. I believe I may have had a missed
2 call, as well, but I was at work.

3 BY MR. MCGAVIN:

4 Q. In other words, when the case was continued in March, my
5 office, my team, notified you of the new trial date; isn't
6 that correct?

7 A. That is correct.

8 Q. Then my team notified you that you would be needed for
9 trial; is that correct?

10 A. Yes.

11 Q. Then approximately a month or so in advance of trial, we
12 issued a subpoena and notified you that the subpoena was
13 coming and the case would be going forward?

14 A. Yes.

15 Q. Do you recall that?

16 A. Yes, I do.

17 Q. And then that subpoena was the first subpoena that you
18 received, was the one that we had requested, and we had told
19 you it was coming; isn't that true?

20 A. Yes.

21 Q. Thereafter, as the trial unfolded, isn't it correct that
22 I called you each day and each morning, couple of times a
23 day, to let you know the schedule and when you might be
24 needed under my subpoena, and if we were still going to need
25 you for trial?

Eleftherion, A. - Cross

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1 A. Yes. I believe we spoke Monday, Tuesday and Wednesday,
2 yeah, that's right. Yes, at least three or four days, yes.

3 Q. And in that process, we kept you advised so that you
4 wouldn't waste time in court, and you could be available,
5 depending upon how things proceeded so that, understanding
6 that we don't go first on the defense, we go second, so we
7 had to slot you in as to when we might need you. Did you
8 understand all of that?

9 A. Yes.

10 Q. And you actually met with me the Monday before trial to
11 prepare for trial, go over your testimony and understand the
12 logistics of what you could do in terms of a cell phone and
13 all those other things; isn't that right?

14 A. Yes, I believe. It was Tuesday, but yes.

15 Q. Trial was scheduled to start on Tuesday. Do you recall
16 we met at the hotel on the Monday before trial?

17 A. Yeah. I thought it was the previous week, but yes, it
18 has been a long week.

19 Q. Right. It was the previous week, you are correct, before
20 the August 1 pretrial?

21 A. Yes.

22 MR. McGAVIN: Thank you for correcting.

23 I have no further questions for Ms. Eleftherion.

24 THE COURT: Is there anything further from
25 Ms. Eleftherion?

1 MR. HAYSBERT: No. Thank you so much for that. I
2 appreciate it.

3 THE COURT: All right. You're excused for now,
4 again, subject to any call that you may receive from
5 Ms. Armstrong to re-appear.

6 THE WITNESS: Yes, Your Honor. Thank you.
7 (Witness excused.)

8 THE COURT: Did you issue a subpoena for Deajah
9 Clark, Mr. McGavin?

10 MR. MCGAVIN: No, Your Honor.

11 THE COURT: Then we need to get Ms. Clark here to
12 find out the circumstances under which she came to this
13 court, if she came voluntarily, what was said to her. I
14 don't know why somebody would just voluntarily show up at
15 court if somebody hadn't talked to them and said something
16 to them about court if they don't get a subpoena until
17 Friday. So I'm not going to take the representation. We
18 are going to hear from her first.

19 She has a process that tells her to be here. So
20 someone should -- when we take a break, she'll be contacted
21 by the Court, because there apparently is a subpoena for her
22 that told her to be here on the 9th and the 14th.

23 MR. HAYSBERT: Your Honor, I would like to speak to
24 this, if you don't mind.

25 THE COURT: No, not until we get Ms. Clark in here.

1 I want to know why she was here. I want to know if there
2 was anything. I'm worried about the reputation of the
3 court, and if representations are being made, because, as I
4 said before, the Judge's name and the court are on a
5 subpoena, and a layperson sees that, and they associate that
6 with the court and the Judge.

7 As you admitted earlier, lay people don't
8 understand the process. I am concerned if she was told she
9 had to be here. She certainly wasn't an eager witness.
10 Anyone could have observed her. You had me recognize her on
11 behalf of the Court, and I thought I was recognizing people
12 who had subpoenas that were scheduled to be here. You asked
13 me to recognize her, and I did.

14 I didn't have any idea that people were sitting
15 back here this whole time because, again, it's a reflection
16 on the court. It's a public perception, a public perception
17 that the Court simply doesn't respect people's time, they
18 have them sitting in rooms for days. I didn't know they
19 were here. I didn't know these people were here. I had not
20 recognized Ms. Eleftherion, to my recall.

21 So I had not recognized her, and I did recognize
22 Deajah Clark, and apparently she hadn't been served, so I
23 want to know why she came. Did somebody tell her she had to
24 be here? Was it made clear to her that it was voluntary
25 outside of a subpoena, and then a subpoena gets served on

1 Friday? I've asked Mr. McGavin. He didn't serve her a
2 subpoena because that might have cleared it up. In any
3 event, we need to get in touch with Ms. Clark, and I would
4 like to see a copy of what you have that you sent to be
5 served to her because that will give a location for her.

6 MR. HAYSBERT: Sure, Your Honor. Initially, we
7 couldn't find her because we thought she was still working
8 for Outback. I brought this to the attention of the Court
9 at final status conference, that we were still looking for
10 her, and if we couldn't find her, we would need to utilize
11 the affidavit, and we provided the evidence on that. We
12 were able to finally find her, and we served her with a
13 subpoena.

14 THE COURT: Wait just a minute. You didn't serve
15 her with a subpoena until Friday. She's already testified.

16 MR. HAYSBERT: No, we served her twice with a
17 subpoena.

18 THE COURT: Where are they?

19 MR. HAYSBERT: There were two different subpoenas
20 served for Deajah Clark. The first subpoena only covered
21 through Thursday. Because she had not testified by
22 Thursday, she told me, in order for me to, you know, not get
23 in trouble at Texas Roadhouse, you need to serve another
24 subpoena for me so that I'm able to appear in court an
25 additional time. Doesn't matter that you recognized her.

1 She had to deal with her bosses at her place of employment,
2 so we served another subpoena for her at Texas Roadhouse.

3 THE COURT: Where is the first one that was served?

4 MR. HAYSBERT: The first one should be with BFRM
5 Legal. I can provide service for that.

6 THE COURT: Yes, you are going to have to.

7 MR. HAYSBERT: Sure. We finally found her, so I'm
8 happy to provide that.

9 THE COURT: That's fine. If she was under
10 subpoena, and I recognized her, I don't have a problem with
11 that.

12 MR. HAYSBERT: Yes.

13 THE COURT: But I need to know that she was under
14 subpoena.

15 MR. HAYSBERT: She was definitely under subpoena,
16 and I'll provide the service to Your Honor.

17 THE COURT: Who served her? Do you know?

18 MR. HAYSBERT: You know, Ms. Donaldson talked about
19 serving her once.

20 THE COURT: She said she served her Friday.

21 MR. HAYSBERT: Right. So then she served her the
22 additional subpoena that was sent out so that she wouldn't
23 get in trouble at work. There was a person who served her
24 initially with the initial subpoena, which required her
25 presence, and she was here under subpoena starting for

1 Tuesday, Wednesday and Thursday. So I don't know who
2 specifically did it. I sent everything to BFRM, and my
3 process server, and they send it out and sub-serve through
4 someone like Ms. Donaldson, just an independent contractor.
5 So what I will do is I will find out from them. I believe I
6 have the proof of service who actually served it. I'll
7 provide that to the Court.

8 THE COURT: I just didn't catch your last word.

9 MR. HAYSBERT: I can provide that to the Court,
10 yes.

11 THE COURT: You have it now?

12 MR. HAYSBERT: I do -- I should have it in my
13 inbox. If I go to my car, I have a Wi-Fi printer set up
14 right there in the trunk.

15 THE COURT: On the first break, we are not going to
16 do the prior thing again because each time we have done it,
17 it's been an extremely long time. But if you've got a proof
18 of service for her, it needs to get here, and if you don't
19 have it, it needs to get here today.

20 MR. HAYSBERT: I will make sure it gets done, Your
21 Honor, and thank you very much.

22 THE COURT: I have one more question for you,
23 Mr. Haysbert.

24 MR. HAYSBERT: Yes, Your Honor.

25 THE COURT: Can you clarify for the Court how you

1 knew Mr. Wilson had been served on Friday because he was not
2 served until 5:25, and we were in court at that time. You
3 represented something about his service at that time, and so
4 I don't understand why you made that representation, but
5 perhaps you can enlighten the Court.

6 Because, as I recall, and as times that are before
7 the Court, Mr. Wilson was not served until 5:25 p.m., and
8 the jury was here until after 6:00 or around 6:00 or so, and
9 then we took -- then the Court asked you some questions, and
10 then we took the break for you to go and get whatever you
11 got. We didn't get out of here until sometime after 7:30.

12 You made that representation to the Court before
13 any break, before you went on your search for the subpoenas.
14 So what was the basis for that?

15 MR. HAYSBERT: Well, three things. Number one, I
16 deposed Mr. Wilson. Number two --

17 THE COURT: You deposed Mr. Wilson.

18 MR. HAYSBERT: Sure.

19 THE COURT: Deposing him has nothing to do with the
20 subpoena being served for court. So that's not an
21 acceptable reason.

22 MR. HAYSBERT: It's relevant because I actually
23 know what he looks like, and I thought I saw him that day at
24 court.

25 THE COURT: You thought you saw Mr. Wilson at court

1 that day?

2 MR. HAYSBERT: That's correct.

3 THE COURT: Where?

4 MR. HAYSBERT: Here. That's why I called him.

5 THE COURT: No. You called him earlier in the day.

6 Assuming that's correct, you thought you saw Mr. Wilson, you
7 called him earlier in the day. He wasn't here.

8 MR. HAYSBERT: I don't know why he wasn't here. He
9 had been there early in the day because I saw him.

10 THE COURT: I'm not getting into that
11 representation because you called, you went out and looked,
12 and you said he wasn't here. That's not my question. That
13 you took the deposition of him and that you thought you saw
14 him earlier in the day, you called him, he didn't appear.
15 What I'm asking you about is the timing of this.

16 We specifically have proof now that he was served
17 at 5:25 p.m. You were here in court, and before you went
18 out looking for these subpoenas, and took almost I think
19 about an hour, more than an hour, I don't know, I haven't
20 gone back and looked at the timing, but we were here for a
21 long time. The Court finally came back in, and we all just
22 sat and ended up not getting out of here until sometime
23 probably close to 8:00 or well after 7:30.

24 What I want to know is you made a representation to
25 the Court, after the jury had been excused for the evening,

1 and we were trying to get straight all of these matters, you
2 said that he'd been served. I'm trying to find out from you
3 why you made that representation to the Court because you
4 had no proof of service. Deposition is not service for
5 trial. Thinking you see somebody in the hall is not service
6 for trial.

7 What were your grounds? Did you have a subpoena?
8 You knew you had put something out. What were your grounds
9 for saying that a subpoena -- I mean, how did you know? Do
10 you have a computer in here or a phone in here or something?
11 How did you know? What was the basis for that statement at
12 that point in time?

13 MR. HAYSBERT: Your Honor, I believe I seen him
14 here, and I know that I asked for him to serve the subpoena
15 before noon. So I thought that that was Mr. Wilson, and
16 Mr. Wilson would be coming in to testify.

17 THE COURT: You said to the Court Mr. Wilson wasn't
18 here. Please answer a question. I'm asking you a direct
19 question. What was your basis for saying to the Court that
20 he had been served with a subpoena? Did you have any proof
21 of service? Did you have anything back showing he had been
22 served?

23 MR. HAYSBERT: Your Honor, I sent out a subpoena in
24 the morning to him and requesting that BFRM serve him before
25 noon. So I had a reasonable basis to believe that he had

1 been served. In addition to that, I saw him here, or
2 believe that I saw him here, and that's why I called him to
3 the stand.

4 THE COURT: All right.

5 MR. HAYSBERT: Thank you, Your Honor.

6 THE COURT: Do you have anything further to present
7 on your motion other than argument, Mr. McGavin?

8 MR. MCGAVIN: No, Your Honor.

9 THE COURT: Do you have anything further,
10 Mr. Haysbert, to present on your motion other than argument?

11 MR. HAYSBERT: No, Your Honor.

12 THE COURT: Argument, Mr. McGavin.

13 MR. MCGAVIN: Your Honor, there is a process here
14 for orderly dealing with our citizens and opposing counsel.
15 It requires planning and preparation, and in particular this
16 Court demands it and expects it. This case has been
17 absolutely, from day one through this trial, marked by these
18 type of tactics. This subpoena to Marcus Wilson
19 demonstrates the worst of last-minute requests that are
20 consistent with everything else that has happened in this
21 case, and perhaps I'm arguing one of the other motions.

22 THE COURT: Ultimately probably a lot of it's going
23 to be tied up together.

24 MR. MCGAVIN: It's difficult to separate it, and we
25 dealt with the Nick Seifert subpoena.

1 THE COURT: Excuse me for a minute. I would agree
2 with that. I would tell you over the weekend, for which I
3 and my chambers worked, as I assume the court reporter did,
4 too, there are many, many moving parts, and it is very
5 difficult to piece them together. This is just another
6 example, in the Court's mind, of untimeliness and not
7 following the rules. You can argue, and Mr. Haysbert can
8 respond, and at some point we will try to put together all
9 these moving parts.

10 MR. MCGAVIN: One of the reasons I believe that
11 these rules are in place is not only can the citizens
12 prepare for it, but opposing counsel can be adequately
13 prepared for the issues that will be presented, and then, of
14 course, there's the Court and the Court's team, including
15 the people that assist the Court in reviewing the case law,
16 because in so many ways this is such a simple,
17 run-of-the-mill case. It's a slip and fall case. It's a
18 two-day case. We couldn't even get a jury picked until the
19 end of the second day because of all of this constellation
20 of constant difficulties complying with the rules.

21 So we are here. We are trying to prepare, and we
22 get a subpoena for Nick Seifert. Nick calls me at 10:30. I
23 hadn't subpoenaed him. I did not think he would be a
24 necessary witness for us. I knew he had not been
25 subpoenaed. I've contacted my witnesses, my people weeks in

1 advance. They all have my cell number, and I get this phone
2 call from Nick that he's been served. So now I've got to
3 stop trial preparation and get a motion to quash filed.

4 It's not as if I'm receiving correspondence or
5 indication from Mr. Haysbert, hey, I forgot to issue the
6 subpoena for Nick Seifert, are you calling him, have you
7 subpoenaed him, do you object if I issue it? So I can
8 prepare at least and know this is coming. None of that. It
9 is surreptitious. It's just done, and then we have to
10 respond. The Court has to respond.

11 At some level, eventually the Court, as the
12 gatekeeper of this process, has to say no more. Now, Your
13 Honor listened carefully, I believe, to the reasons why
14 plaintiff thought Mr. Seifert was necessary, and I had
15 informed him, the Court may require it, and so when the
16 Court ordered that he appear, I contacted him and said, be
17 here tomorrow 2:00. We have agreed to that. And then he
18 sat. I had made an agreement and had to stand by it.

19 So what happened with Mr. Wilson is the same thing.
20 I didn't think his testimony was important, but knowing that
21 he might be needed to explain, as I discussed in opening
22 statement, there may be evidence, I'm not sure if it's going
23 to come in, but there may be evidence about a problem at the
24 front door. That was Mr. Wilson's knowledge about this
25 case. So I had him under subpoena.

1 But eventually, as the evidence developed, I
2 released him with no expectation that he would be served and
3 certainly not served on Friday. I must say, Your Honor,
4 just on behalf of Mr. Wilson, Mr. Wilson has been
5 transferred from the Williamsburg Outback to a struggling
6 restaurant in Virginia Beach. Friday he had made
7 arrangements and had been asked by the Virginia Beach
8 lifeguards to have a beach party for their annual event.
9 It's a great opportunity for him, and he had to be there no
10 later than 3:00. And so knowing that he had that personal
11 commitment, which was critical to his opportunity to restart
12 this Virginia Beach restaurant, which was struggling, and
13 turns out it was very successful. I heard from him on my
14 way home Friday evening. I had no idea this was coming.

15 So we, as attorneys, have a tremendous amount of
16 power, and we pull those levers of power with the threat of
17 incarceration, and they bear the stamp of Your Honor and
18 this court as well as the good name of the attorney who
19 signs these things.

20 In this case, these subpoenas are signed only by
21 Mr. Haysbert. He's a foreign attorney. He has, in this
22 subpoena and the other subpoenas, demonstrated no respect
23 for our local rules, didn't come before the Court and say,
24 Mr. Wilson is a critical witness. I'm requesting leave to
25 subpoena him. All the things that you do upfront when

1 perhaps there is an oversight by your team or yourself, ways
2 that you can manage these things. But it's upfront and
3 straightforward, and you accept responsibility if you've
4 made a mistake. But here, even the simplest question that
5 Your Honor just asked about that subpoena, Mr. Haysbert said
6 there are three things. He only listed one because he
7 thought he saw Mr. Wilson earlier, and then stood before the
8 Court at 6:00 and says, "I have served him." And the Court
9 said, "Where's the paper?" He said, "I'll have to go get
10 it, it's in my car." An hour and a half later, my team,
11 Mr. Graham, were here, were sitting here, because it was a
12 representation about a subpoena that wasn't even served
13 until 5:25 at his work. I knew where Mr. Wilson was. He
14 was out on the beach at Virginia Beach with the lifeguards
15 promoting his store on a matter that was critically
16 important to him.

17 And I think this subpoena has kind of been
18 indicative of what had happened over the past five days.
19 Simply stated, Your Honor, it doesn't comply with the rules.
20 It should be quashed. There is no exceptional circumstances
21 of good cause, why it wasn't issued, and there was a
22 representation made in this court that counsel knew -- I had
23 no idea that a subpoena had been issued or that he had been
24 served at 5:25. I would have no way, although my phone was
25 certainly filled with messages when I finally left here

1 around 8:00.

2 THE COURT: I think you did represent to the Court
3 that you talked to him earlier in the day and that he had
4 not been subpoenaed.

5 MR. MCGAVIN: That is correct, Your Honor. I
6 released him. I said your evidence, I don't believe, will
7 be helpful. We have covered it with Nick Seifert and with
8 Alicia Eleftherion, and I was prepared, and I'm still
9 prepared to call Lisa Crosby to explain about the problem at
10 the front door.

11 So it was irrelevant and not pertinent, in my mind,
12 depending upon the Court's testimony, to keep him here. So,
13 Your Honor, simply stated, just on its face, this subpoena
14 should be quashed, but more significantly, it needs to be
15 considered with the other motions before the Court. Thank
16 you.

17 THE COURT: Mr. Haysbert.

18 MR. HAYSBERT: Thank you, Your Honor. I would
19 first want to apologize to you, as well as outside, on
20 Friday gathering the materials. I understood that you had a
21 family obligation that you were missing, and I do deeply
22 respect you and the family that you have. I'm sure did as
23 well. So my apologies to you for taking up the time. I
24 want to say just a few brief words in response to
25 Mr. McGavin.

1 I want to start with the fact that we are a part of
2 the bar, and we should work together to present a case to
3 the jury that they could see with respect. I started with
4 the conversation with Mr. McGavin, very rarely wants to
5 speak to me, so that conversation happened through my local
6 counsel, Mr. McKelvey.

7 We were trying to get an agreement to have
8 Mr. Marcus Wilson show up for trial because he was such a
9 critical witness for us. He had already subpoenaed him, and
10 he had subpoenaed him on days that we were going to call
11 him. So would you be willing to allow this person to be
12 here? When I saw Mr. Wilson, or thought I saw Mr. Wilson on
13 Friday, and he was here, there was no agreement, but because
14 he was here, he could be called, and so I called him, but he
15 didn't show up.

16 So I don't know what happened to him, and it may
17 have been because Mr. McGavin released him. But either way,
18 we had a conversation, and this is not surreptitious. We
19 have had him on our list, plaintiff witness for months.
20 He's known that we wanted to call Mr. Marcus Wilson. He's
21 known why. So there is no last-minute effort to, you know,
22 suddenly get a witness here. I think what's happening is he
23 understands, Mr. McGavin, how critical this witness is, and
24 is willing to release him in the face of our attempts to
25 reach an agreement to have him here.

1 So in an abundance of caution, a subpoena was
2 served under the federal rules. The federal rules don't
3 speak to the time period in which to return a subpoena. The
4 local rules do. The local rules don't say, if you serve a
5 subpoena within the 14-day period, that you lose your *pro*
6 *hac vice* or you lose your bar license or you can no longer
7 operate as a lawyer in this courtroom.

8 What it says is the Judge has the authority, you,
9 Your Honor, have the discretion, and ultimately that is all
10 that I can do. I can only serve the subpoena, which is what
11 my option is, and it's up to you at that point whether or
12 not you are going to allow the subpoena to go forward or
13 not. There is no violations of the local rules in that
14 sense.

15 THE COURT: It does except as local Rule 45(e)
16 requires that except as otherwise ordered by the Court or
17 for good cause.

18 MR. HAYSBERT: Understood.

19 THE COURT: Subpoenas for attendance need to be
20 served 14 days in advance. You never asked for any order of
21 the Court in advance. You just went right ahead and did it,
22 and so the only thing you have to argue is good cause.

23 MR. HAYSBERT: That is correct, Your Honor.

24 THE COURT: I made no order. It was not brought to
25 the Court's attention in advance. It was just done.

1 MR. HAYSBERT: Absolutely, Your Honor. And it's up
2 to the Court's discretion how it wants to do it from there,
3 but I can tell you that we know he's a critical witness. We
4 have known for years that he is. We tried to reach an
5 agreement with Mr. McGavin and were unable to. We saw him
6 in court. He refused to come in. We subpoenaed him, and
7 it's up to the Court from there what the Court wants to do,
8 but I will say this.

9 THE COURT: I don't know that he refused to come in
10 or not. I don't know anything about him other than he was
11 not under subpoena by you, and he did not come when called.
12 So I don't know anything. That's as far as I can determine
13 at this point.

14 MR. HAYSBERT: Understood. I have one more thing.
15 Your Honor, we have -- the importance of Mr. Wilson comes
16 down to one thing, and that is a work order that he put in
17 before the plaintiff fell. That work order goes to notice.
18 That work order goes to whether or not there was actually a
19 defect in the floor. That work order is something that he
20 put in, and in his deposition he stated that he did. He
21 recognized, he knows about it. We tried to get that work
22 order in in a number of different ways. One way is through
23 Marcus Wilson, but there are several other ways we can do
24 it. We could just move it formally into evidence because of
25 what it is. We could request that the Court decide that the

1 piece of evidence is important enough to do it without going
2 through a witness. And we have tried to do that, but we
3 haven't been able to successfully.

4 So this was our last option. We didn't necessarily
5 need him to bring in this piece of evidence. But if he's
6 here, then we would like to bring in the piece of evidence
7 through him, especially if we are unable to do it another
8 route. So that's where we stand, Your Honor.

9 It's within the Court's discretion how it wants to
10 do all of this, but we would ask Your Honor that if you do
11 not allow Marcus Wilson to come in, that you use that as
12 part of your basis for good cause to formally move into
13 admission the work order, and we will be happy to provide
14 you with a proffer of his deposition testimony to support
15 that. Thank you very much.

16 THE COURT: Anything else, Mr. McGavin?

17 MR. MCGAVIN: If he was the most important witness
18 for the plaintiff, I think he'd serve him six weeks in front
19 of trial, not the fourth day of trial, and that's the
20 problem, and that's the pattern in this case. It should be
21 quashed. It's so incredibly -- I don't know the right word.
22 I would call it -- it's like the idea that we would sit here
23 and wait for an hour and a half. Everything is revolving
24 around what plaintiff's counsel wants to do, and everybody
25 else is at fault but him. And at some level the Court has

1 to hold Mr. Haysbert and his local counsel responsible and
2 not pin this on the defense, because if it was the one
3 critical witness and piece of evidence, you might want to
4 issue that subpoena eight weeks in advance and then
5 designate the deposition sections that you wanted in advance
6 as well. None of that was done.

7 THE COURT: I understand.

8 MR. MCGAVIN: Thank you.

9 THE COURT: First, this is my ruling. I just want
10 to note that the Court has done everything it knows to do to
11 keep this case on track, starting with the hearing on August
12 1 where we took up pretty much a full day to try to bring
13 this case together and get it clear what was being
14 presented, the witnesses. The Court did everything it could
15 to keep the case moving and to, frankly, help the plaintiff
16 along.

17 Then on August 8, we get here, and there are all of
18 these issues to work out again. The Court spent that day
19 working them out. The Court did not quash Mr. Seifert. It
20 was represented he was a critical witness, and I gave the
21 one -- I should have quashed it, frankly, but I didn't,
22 because you represented it was a critical witness, and I
23 said, okay, I'm not going to, at the start of the case, I'll
24 go ahead and let Mr. Seifert testify. But you have shown no
25 good cause for the delay on Mr. Wilson.

1 First of all, you say he's critical. Well, if he's
2 so critical, and you were never able to reach an agreement
3 with opposing counsel, no opposing counsel has to agree to
4 produce a witness, and you didn't have an agreement, and you
5 knew you didn't have an agreement, and you said it's been
6 difficult to get agreement.

7 Okay. This case was set on March 1. The trial was
8 set to start on April 8th. I've written this down without
9 Mr. McGavin even saying anything. Then you said he's been
10 on the list for months. Well, if he's so critical, and he's
11 been on the list for months, and you've had from March 1 to
12 August 8, there is no excuse. There is just no cause,
13 particularly after we have gone through this before in the
14 case. So we've gone through this before. The Court has
15 constantly been trying to keep things on track. I didn't
16 quash Mr. Seifert. It was all the same issues, except now
17 you say, well, he's critical, but there are other ways. You
18 did say that. I don't know if there are other ways or not.
19 First you said he is just critical to our case. Then you
20 say, well, there are other ways, and you never had an
21 agreement. I don't know if you and Mr. McGavin are
22 discussing anything, from what I can tell. We will get to
23 that later.

24 But *pro hac vice* counsel signs on, and you agreed
25 to abide by the federal rules and the local rules of this

1 Court, as does Mr. McKelvey, and he's a member of the bar of
2 this Court, and he knows the rule. So if he was *pro hac*
3 vice, didn't know them, your responsibility was to consult
4 with Mr. McKelvey. The federal rules and these local rules
5 are clear.

6 They say as follows: Pursuant to Federal Rule
7 45(d)(3)(A)(i), "On timely motion, the Court for the
8 district where compliance is required must quash or modify
9 subpoena that: Fails to allow a reasonable time to comply."
10 Local Rule 45(e) then requires that, "Except as otherwise
11 ordered by the Court or for good cause, 'subpoenas or
12 attendance of witnesses or hearings or trials in civil
13 actions shall be served not later than 14 days from the date
14 of the hearing of trial.'"

15 Mr. Wilson was served at the 11th hour. If things
16 wouldn't have been so delayed, we should have been through
17 with trial on Friday. But during trial, after basic
18 business hours at 5:25 p.m. on August 11, 2023, and there
19 has been no cause, certainly not good cause, shown for not
20 following these rules. We had been through them before.
21 You had gotten the benefit of Mr. Seifert. You knew the
22 rules. You knew you didn't have an agreement. You've known
23 this trial has been set since March 1, and, frankly, there
24 is no excuse whatsoever for not having served a timely
25 subpoena on Mr. Wilson. If you could do it Friday, then you

1 could have done it earlier. I just don't know. But that's
2 not the Court's concern.

3 The Court's concern are these rules, and,
4 Mr. Haysbert, you are just as responsible for following
5 these rules as local counsel, and if you don't know and
6 understand the rules, I believe that Mr. McKelvey has been a
7 member of the bar of this Court since 2008. So if he
8 doesn't know the rules by now, that would shock the Court.
9 You have to consult him, and he has to speak up when the
10 Court asks him. I asked him repeatedly through this trial,
11 I don't know anything about it. Friday night he said he
12 didn't know anything about it.

13 When you were out looking for it, he said the only
14 thing he heard was something around, he thought, 3:00, and
15 don't quote me exact time or whatever, but it was some time.
16 When I asked him what do you know about this, and he said he
17 just learned you've done it that afternoon.

18 So he's not being consulted, and he's local
19 counsel, and you're both responsible for following the
20 rules. This rule had already been violated. You'd already
21 been cautioned. You've known about this trial for months.
22 Then you also said you had had him on a list for months.

23 Well, if he was that critical and you had him on a
24 list, follow the rules. I find no good cause for this
25 subpoena having been served on Mr. Wilson at his place of

1 work, through his manager, but let's just assume that's
2 service, assume that in and of itself, is not timely, it's
3 not timely, and it's in violation of the rules. The federal
4 rules leave it to the local courts, and the local courts set
5 their lime limits, and this time limit is set, and if
6 Mr. McKelvey has been practicing in this court for that many
7 years, been a member of the bar of this court, he's
8 responsible for knowing the rules. I grant the motion to
9 quash.

10 MR. HAYSBERT: Thank you very much, Your Honor.

11 MR. McKELVEY: Your Honor.

12 THE COURT: Yes, sir.

13 MR. McKELVEY: I believe Mr. Wilson is here. Would
14 someone -- I mean, if you are looking to quash the subpoena,
15 is he released or how does the Court want to handle that?

16 THE COURT: Mr. McGavin can tell him he is
17 released. I've granted Mr. McGavin's motion.

18 MR. McKELVEY: Understood. I just wanted to --

19 THE COURT: I think that's up to Mr. McGavin.

20 MR. McKELVEY: Yes, ma'am.

21 THE COURT: Did you get in touch with your
22 witnesses, Ms. Blake?

23 MR. McGAVIN: You directed the question to
24 Ms. Blake, but I did notify Mr. Wilson that he would not be
25 needed today, as we were directed by the Court.

1 THE COURT: Well, the subpoena is quashed.

2 MR. MCGAVIN: So if he's here, I would be quite
3 surprised.

4 THE COURT: Why don't you go out and check and let
5 the Court know.

6 MR. MCGAVIN: Thank you.

7 THE COURT: In any event, he is quashed. I'm not
8 going to allow testimony under a subpoena at this late
9 juncture.

10 MR. MCGAVIN: We will check, Your Honor. Could you
11 tell me which motion you are going to do next?

12 THE COURT: We will take a recess. You need to
13 contact your witnesses, I don't know if you have or not,
14 because it's already 12:30, and we've just gotten through
15 the first motion. We are next going to take up the motion
16 to revoke Mr. Haysbert's *pro hac vice* status.

17 MR. MCGAVIN: Thank you, Your Honor.

18 THE COURT: That's going to be the next motion that
19 we take up.

20 MR. MCGAVIN: Thank you.

21 THE COURT: You can go ahead out while I go through
22 them, and then after that we are also going to look at a
23 mistrial, because I think a lot of the matters that are at
24 issue for the revoking the status also tied into the
25 mistrial, at least from the Court's standpoint, not just the

1 insurance issue, it's the overall looking at attorney's
2 conduct, looking at what's being proceeded in the court. I
3 would ask you this, Mr. McKelvey.

4 If the Court revokes Mr. Haysbert's *pro hac vice*
5 status, are you prepared to take over the trial of this case
6 tomorrow in front of the jury?

7 MR. MCKELVEY: Yes, Your Honor. By tomorrow -- I
8 will be prepared tomorrow.

9 THE COURT: You will be prepared to take over this
10 case tomorrow?

11 MR. MCKELVEY: If the Court orders that, then, yes.

12 THE COURT: Thank you. That would be without any
13 consultation with Mr. Haysbert. You understand that? If he
14 is -- if his *pro hac vice* status is denied, he cannot
15 participate any further in this case.

16 MR. MCKELVEY: Understood, Your Honor. Just to
17 clarify, I would be able to talk to him not in court but
18 just in general and be sure I have the required information.

19 THE COURT: You should already have it.

20 MR. MCKELVEY: I mean just pointing it out to me
21 and that type of thing, like where it is in the documents, I
22 mean, what notebook, et cetera, that type of thing.

23 THE COURT: All right. The Court stands in recess
24 for 15 minutes.

25 (Recess from 12:35 p.m. to 12:55 p.m.)

1 THE COURT: Mr. McGavin, it's your motion regarding
2 the *pro hac vice* status, subject to revocation. You can
3 proceed to argue your motion. I have read your memorandum.
4 You put some caveats in there, and I remember telling you on
5 Friday that I knew it was a lot to get together, and so you
6 could add orally to the motion. The main thing was that
7 Mr. Haysbert had a chance to respond. The Court may have
8 additional reasons that it will give Mr. Haysbert to
9 respond.

10 MR. MCGAVIN: Thank you, Your Honor. It is
11 difficult to try to describe the last two weeks of this
12 case, and it's been suggested by Mr. Haysbert that
13 discussions with counsel, meaning me, have been hard, but
14 I've tried to avoid those, to deal strictly in writing to
15 avoid any misunderstanding.

16 So what happens I think out of the courtroom is a
17 little bit like my first grade cafeteria where we had a
18 cafeteria monitor. When the monitor is not there, you know,
19 stuff happens, and it's sort of water under the bridge, so
20 to speak, in my mind. But the way this trial has proceeded,
21 and the imposition upon witnesses and the Court and the
22 conduct does not comply with what's required by the local
23 rules. There are numerous examples, as we have gone
24 through.

25 So we start on the pretrial on August 1 where

1 counsel did not have exhibits and was clearly not prepared
2 to go through what it was required. So I gave the Court my
3 book of exhibits, which I'm happy to do, and would share.
4 But in order to make the pretrial meaningful, we had to do
5 that, and which is fine. We created another book. But the
6 problem was, based upon the rulings of the Court, we needed
7 to know what was being changed and withdrawn, in particular
8 regarding an animation and a PowerPoint, as well as other
9 exhibits which were still pending. So the Court had ordered
10 that to be produced.

11 I thought it was to be produced within 24, maybe it
12 was 48 hours, but certainly before the day of trial. So
13 when I came down Sunday to be ready to go on Tuesday, and we
14 didn't receive anything, and came to court on Tuesday, I had
15 received a message from my staff at about 7:30 in the
16 morning that a box with two binders had arrived at my
17 office, and that was my pretrial list. That was the
18 animation which, to my knowledge, I don't believe we ever
19 received, and the PowerPoint, which was amended and changed.

20 So that led to the whole inquiry, which took a good
21 part of the day on Tuesday about how did you send it? And
22 so discovered that it was scheduled to be sent or presented
23 to the FedEx on Saturday, and the FedEx tracking documents
24 clearly demonstrated it was scheduled for delivery in
25 Fairfax, 170 miles from here, on Tuesday morning,

1 notwithstanding the protestations from Mr. Haysbert.

2 So we had to adjust and scramble to get that done.
3 Things do happen in court that nobody expects, but the
4 difficulty was the representations of what had been done.
5 Every time it was, was this done? What day? Once the
6 documents started to be produced, it started to show a
7 record of things that were being represented. It was
8 inconsistent with the documents. So we continued with that
9 inquiry.

10 We came back on Tuesday for -- we also on that
11 Tuesday dealt with this motion that was received on Sunday
12 evening for remote testimony of Dr. Haider, which we first
13 heard about during the settlement conference that the Court
14 has ordered the Friday before the trial. The motion was
15 filed Sunday evening, I believe. The record will reflect.
16 Again, we, on Monday, we filed a brief in opposition the
17 Monday before the trial, addressing these matters
18 questioning where's the plane tickets? Where's the witness
19 fee? You can't possibly expect to bring four out-of-state
20 experts on a case of this nature and not pay these folks in
21 advance.

22 You just realistically, logistically, as an
23 experienced trial lawyer, if you are bringing experts from
24 out of state, you have to spend 75, \$80,000, easily. You
25 have to invest that. I suspected that perhaps the funds had

1 not been paid or the flight arrangements made, which is why
2 we put that in our brief.

3 The Court went into great deal to question that
4 representation that the experts were coming, and imposed
5 requirements on an affidavit from the experts by 5:00 the
6 next day, which would have been Wednesday. When we appeared
7 in court, we learned that Dr. Haider was withdrawn, which we
8 had prepared for her testimony. She's withdrawn. The two
9 other experts are withdrawn.

10 Now the plaintiff is relying only on Dr. Filler,
11 which plaintiffs -- parties can withdraw their experts, but
12 the key to it regarding the *pro hac* issue is representing to
13 the Court that these people are coming, I paid them, plane
14 tickets are issued, hotel arrangements are made. They're
15 going to be here. And when called to task on the
16 documentation, those questions are unanswered.

17 After 40 some years of practice, I don't think you
18 need 40 years of practice to know that to fly in experts
19 from California is going to cost a lot of money, or Houston,
20 or Florida. None of that has been produced ever. No
21 affidavits, just sorry, just kidding. I wasn't -- they're
22 not coming.

23 THE COURT: Also, part of the affidavit was to
24 state what contact you had had not only to arrange for
25 transportation but to be notified of appearance at trial.

1 So none of that is clear to the Court at this point.

2 MR. MCGAVIN: So then we get into the issue of the
3 subpoena to Nick Seifert. We already discussed that, I
4 think in some detail. Then there is the Marcus Wilson
5 subpoena, which led to the whole discussion on Friday
6 evening when we are all sitting here, a representation he
7 had been served, which obviously counsel had no direct
8 knowledge of that, I think it's clear from the suggestions
9 that we've heard.

10 Then we get into the Court's frustration and the
11 comments on the record asking counsel why? Why is this
12 happening? I don't understand why this is happening. The
13 Court's comments repeatedly, essentially a warning to
14 counsel, that certain conduct defined in the rules of
15 courtroom decorum, maybe that's an antiquated term, I don't
16 know, but having been a law clerk for Oren Lewis in 1982,
17 his last law clerk, I think I learned pretty well during the
18 course of that year before his death, and having served as
19 the chairman of the magistrate selection committee for many
20 years, interviewing the candidates, or I've served one
21 term -- two terms, magistrate selection chair, as well as
22 being on that committee for almost 20 years, I know what's
23 required of this court, and it requires counsel shall at all
24 times conduct and demean themselves with dignity and
25 propriety. And, quite simply, that does not mean constantly

1 interrupting the Court, talking over the Court. Now we are
2 hearing what I would call an obligatory thank you to every
3 ruling, even if it's adverse, which could be construed a
4 particular way, if you wanted.

5 But the most telling were the outbursts in court,
6 slamming paper down, and yelling out at one point, "That's
7 objective evidence."

8 THE COURT: It was also in front of the jury.

9 MR. MCGAVIN: That is correct, Your Honor. In
10 front of the jury, so, basically, disrespecting the Court,
11 disrespecting the jury. If the Court allows that -- there
12 is no apology that fixes that. Mr. Haysbert can say thank
13 you, thank you, thank you now and be as polite as a choir
14 boy, but this is a serious issue. It is a gatekeeping
15 function of the Court, and I would just note parenthetically
16 that in Virginia, Virginia State Bar has made it much more
17 difficult to obtain, in state court, *pro hac* admission.
18 This Court has a history of revoking licensure. Senator
19 Morrissey was revoked long before the state bar revoked his
20 ability to practice.

21 So this Court has been in the forefront, I would
22 suggest, in demanding a particular level of conduct by
23 counsel. It's an entire collection of difficulty for the
24 defendant to get a fair trial in many ways because it's a
25 bit of a show, and you're in a position where you can't

1 constantly object because then the jury thinks you are
2 hiding things. But eventually, by Friday evening at 7:30,
3 facing travel home, and we are sitting and waiting for
4 something that once it appeared wasn't even complete and
5 wasn't what was represented, that's when I made this motion
6 to revoke the *pro hac*.

7 I admit that in the discussion and the battle in
8 trial sometimes anyone can become a little less dignified on
9 an occasion, but there is a pattern here, and there's a
10 pattern not only of the failure to follow appropriate
11 decorum, but there is a pattern of representations, which,
12 having it challenged, seeking the documentation, and it's
13 not what's represented repeatedly.

14 Then turning to local counsel and saying, what do
15 you know about this? And having local counsel say, even on
16 one occasion, I'm sorry I wasn't really paying attention to
17 what was happening. That did occur. And essentially just
18 being a ticket to be in this court without active
19 involvement. These documents are being signed only by
20 Mr. Haysbert, not by local counsel.

21 So simply stated, Your Honor, the privilege to
22 practice in the Eastern District of Virginia and in this
23 court is a high honor and a privilege, and it should not be
24 demeaned, and it doesn't get fixed by the end of starting
25 the next week by thanking the Court constantly and

1 apologizing. It's too late. We are talking about a serious
2 matter, serious to the clients for both sides, serious to
3 the jurors who have now been pulled away from their families
4 for all these days.

5 Am I going to court? Am I not? What arrangements
6 to make, as well as witnesses, expert witnesses for the
7 defense, Dr. Pugach. All of those things are cascading to
8 impact this trial. It is well within the Court's
9 discretion. I'm sure there are pieces of this that I've
10 missed, but we've cited case law on it, which we rely upon,
11 but I'm certain Mr. McKelvey's indicated that he can try
12 this case, and the case probably will move a little quicker
13 and to the benefit, frankly, of both sides.

14 THE COURT: But the problem with that is, the Court
15 can't explain to the jury. Mr. McKelvey hasn't examined a
16 single witness. He's only answered a few questions, to my
17 knowledge, in front of the jury, and they weren't very
18 definitive answers.

19 The plaintiff would be highly prejudiced if only
20 Mr. McKelvey went forward, and that would be the first thing
21 that would be raised, the very first thing. Mr. McKelvey,
22 in my opinion, has not shown he is ready to try the case.
23 But even if he is, you've got to tell a jury, who only
24 Mr. Haysbert has examined every witness, only Mr. Haysbert
25 has been presenting evidence to the Court and to the jury,

1 and the Court would have to explain to the jury that
2 Mr. Haysbert is no longer in the case.

3 Now, that immediately is highly prejudicial. So
4 there would have to be a new trial. There would have to be.
5 You can't just remove him. This was the time that the Court
6 thought was the whole case, and the Court has been made to
7 look like it doesn't represent properly, because I
8 specifically told them during voir dire, it was going to be
9 three to four days, because that's what I had been told.

10 So, consequently, the Court hasn't kept its word to
11 the jury in that regard. I don't know who they may be upset
12 with, whether it be the court or the attorneys. In any
13 event, you can't have an attorney appearing, lead counsel,
14 he refers to himself as lead counsel, and you can't have him
15 appearing as lead counsel. The jury doesn't know he's *pro*
16 *hac vice*. They don't understand *pro hac vice*.

17 Then he's suddenly gone? It leaves the jury to
18 speculate on things that they shouldn't be speculating on.
19 So the problem is, if Mr. McKelvey is ready, that's great,
20 and if there is a mistrial, then he will have a time in
21 which to advise the Court that the plaintiff wants to go
22 forward with the case, and I'll set all that up if I grant
23 the motion. But I'm just saying that I'm glad that he says
24 he's ready to go forward because that makes rescheduling
25 easier, but it has to be, in my opinion, before a new jury.

1 That would just waste more time, frankly, because that would
2 not survive an appeal that the lead attorney, the person who
3 has done everything, is all of a sudden not there, and how
4 do you explain it? There's not something you can do a
5 curative instruction on. I don't know how you'd explain it.

6 Maybe Mr. Haysbert or Mr. McKelvey can, and argue
7 to the Court that it certainly wouldn't be prejudicial, and
8 they won't argue that it's prejudicial. But I think the
9 Appellate Court would find it so anyway, because I do, when
10 you have the presence of one attorney, and all of a sudden
11 they're not there. You can't tell them the attorney is ill.
12 You can't misrepresent to the jury. He is not ill. He has
13 not had a family crisis.

14 There is just nothing truthfully to represent to
15 the jury whether he's been removed from the case. Then
16 that's highly prejudicial. But go ahead. I'm glad Mr.
17 McKelvey says he is ready, then that means if there is a
18 mistrial, then he'll be ready to reset it and go forward
19 with another jury as quickly as possible.

20 MR. MCGAVIN: Your Honor, I understand the Court's
21 concerns, and on behalf of my clients, the expense
22 associated with this case has been extraordinary on what is
23 a pretty routine case in many respects.

24 THE COURT: I couldn't agree with you more. I
25 don't understand it either. That's not my role to

1 understand the expenditures. That's up to the parties. You
2 have to defend it, and I understand the burden on you. All
3 these experts, two jury consultants from California,
4 practicing attorney that's been sitting through the whole
5 case that's not admitted, technicians, three technicians
6 now.

7 So, I mean, I don't know what's causing all this
8 turmoil and expense, but that's not the Court's concern.
9 The Court's concern is the conduct of Mr. Haysbert and the
10 violations not only of the local rules but the federal
11 rules. I will present those to him to respond to if it's
12 not done through what you say. But there is not only
13 violations of local rules, there's violations of federal
14 rules, and the federal rules he should know. As *pro hac*
15 vice attorney, he is charged with knowing those rules.

16 So, consequently, I know I probably can't include
17 everything, but I've gone through as best as I can, to
18 include incidences that he can respond to, as well as
19 everything that you've mentioned so far. So you can
20 continue.

21 MR. MCGAVIN: Your Honor, I think I've covered --

22 THE COURT: We haven't got through the insurance
23 issue yet, because I'm baffled why Mr. Haysbert did, number
24 one, after it was said three times, and then he went back
25 and asked the question to a lay witness, and then also, if I

1 recall, Mr. Chase, he asked the question, and the Court
2 warned him, and what happened?

3 MR. MCGAVIN: Goes to risk management.

4 THE COURT: Everybody knows what risk management is
5 now.

6 MR. MCGAVIN: Of course, they do.

7 THE COURT: That's been the whole issue. Then
8 Mr. Chase. He says, I give you my word, it's a proper
9 question, and it's not going to result. Then there was an
10 objection, I sustained it, and we moved on. It was brought
11 up again with Mr. Chase. There is all this re-bringing up
12 things that have already been ruled upon or explained, and
13 that's of concern to the Court. So let's go through that
14 testimony on insurance.

15 MR. MCGAVIN: Thank you, Your Honor. The key to
16 the insurance piece, of course, is the long discovery battle
17 over seeking that. So to be clear, the way Bloomin' Brands
18 operates is when a store, an Outback store has an incident,
19 an incident report is filled out, and it goes up to risk
20 management. There was a claims person, known as Tristal
21 Hall, and Tristal Hall was tasked with the initial
22 investigation.

23 As I'm sure Mr. Haysbert knows, Tristal Hall
24 actually called the guests on May 25, 2018, according to
25 records. The guest said she didn't want to talk, she was in

1 pain and sleeping, gave her information and says, "Call
2 back." That is two days post-incident. So claims, risk
3 management, Tristal Hall was involved in this matter by May
4 25, 2018, two days post-incident, and called the guest. And
5 so we've known this whole involvement of Tristal Hall. We
6 had motions to compel heard by Judge Miller. He denied the
7 request.

8 Mr. Haysbert wanted to subpoena and depose Tristal
9 Hall about her involvement. We objected, one of the many
10 objections, and motions heard by Judge Miller. So the fact
11 that the process was in place.

12 THE COURT: We can argue the mistrial motion
13 separately, but that's what I was referring to. In other
14 words, there had been rulings on this by the Court.

15 MR. MCGAVIN: Yes.

16 THE COURT: It was elicited, but then it was
17 re-elicited, and it was re-mentioned. Anyway, that is part
18 and parcel in some ways of this *pro hac vice* motion.

19 MR. MCGAVIN: Yes, Your Honor, it is. So I'm sure
20 there is things I've missed, but I think the overarching
21 piece of this is the way this trial has been conducted, not
22 only with the representations, the other things we've
23 mentioned, but the repeated and unrelenting disrespect to
24 the Court and talking over the Court, interrupting the
25 Court, let alone to counsel, but it sends a clear message to

1 the jury, and it does not comply with the local rules.

2 So I'm sure there are other things I've missed.

3 The Court has questions, I'll be happy to respond to any of
4 those other discrete issues or respond once the Court has a
5 chance to talk to Mr. Haysbert.

6 THE COURT: Well, I'm going to let Mr. Haysbert
7 respond to what you've raised, and I will mention and give
8 each of you a chance to respond to other matters that are on
9 the Court's mind in terms of this motion, and then we will
10 proceed from there.

11 MR. MCGAVIN: Thank you, Your Honor.

12 MR. HAYSBERT: Thank you, Your Honor. So I wanted
13 to start back at the beginning of Mr. McGavin's argument.
14 He indicated that there were numerous misrepresentations
15 made to the Court and that one of them included pretrial
16 exhibits. You know, in hindsight, I look back at that
17 moment, and I wonder if it would have been better not to
18 have sent the exhibits.

19 THE COURT: What?

20 MR. HAYSBERT: I wonder if it wouldn't have been
21 better not to send the exhibits through FedEx, because it's
22 caused all sorts of issues for us. We never received
23 defendant's exhibits after the final status conference on
24 August 1st, any updated exhibits from them.

25 THE COURT: Because their exhibits didn't change.

1 You had it. Their exhibits didn't change. They had the
2 notebooks. You had the exhibits as of August 1.

3 MR. HAYSBERT: Of the prior year.

4 THE COURT: No, at the August 1 conference we had
5 the exhibits. Just go ahead. The August 1 conference will
6 speak for itself.

7 MR. HAYSBERT: So we never received a defense
8 exhibit book. We received one before the last trial, but
9 that was a year ago.

10 THE COURT: If exhibits haven't changed, and he was
11 there with his paper exhibits. The courtroom deputy
12 contacted counsel and said you have to be at the August 1
13 conference with your exhibits that you're going to use at
14 trial in paper form. You arrived, you did not have the
15 exhibits, and you said something about you hadn't been able
16 to get in with your computers.

17 Number one, you hadn't made a computer request as
18 required by our rules. Number two, everybody was
19 specifically told that we were going to look at paper
20 exhibits. The reason you look at paper exhibits, if you're
21 on a computer, you have to click to each page. It's like
22 depositions, you show one page, but that doesn't mean that
23 there is not relevance before that or after that.

24 So, consequently, the Court, through the courtroom
25 deputy, told all counsel to bring their paper exhibits. The

1 defendants brought theirs. They didn't need to send you any
2 copy. The reason you had to send copies is because you
3 hadn't brought them to the August 1 conference.

4 MR. HAYSBERT: Thank you, Your Honor. So I never
5 received any communication from the court deputy via e-mail
6 or phone call stating that I need to bring paper copies of
7 anything. If I had received it, it would have been there
8 because I know that it was there before the first final
9 status conference. So I never personally received it. This
10 was an issue that came up at the final status conference.
11 It was a miscommunication between local counsel and I. He
12 never provided me any information about it.

13 When I got to the Court with my electronics, I'm
14 assuming I can go in the same way I did before with the
15 electronics at the first final status conference, but was
16 told, no, you can only bring in paper. He had not
17 previously told me, and the court reporter had never sent me
18 an e-mail or any communication about it. So, yes, I was
19 receiving information at the last minute and was not aware
20 at all. And the way that information came in, it didn't
21 come in over a filing, that I would have been charged with
22 receiving. It was apparently sent through an e-mail to
23 Mr. McKelvey, but I never received it, so I didn't know
24 about that issue. If I had known about it, Your Honor, I
25 would have been there with paper exhibits.

1 But when I submitted -- what I did first, we had a
2 settlement conference on Friday. We updated the exhibits to
3 comport with the Court's rulings from August 1st, the final
4 status conference, and then I mailed it at the first
5 opportunity to Mr. McGavin via FedEx on August 5th. That
6 representation has not changed. I don't know why there was
7 something that came from -- I wasn't in Malibu. I have no
8 idea. My former trial tech was explaining something about
9 if you have a FedEx account, and they have to send something
10 from Malibu -- I didn't understand that. I don't understand
11 why a FedEx package that I mailed out overnight on August
12 5th wouldn't get there until August 8th.

13 THE COURT: But you represented to the Court that
14 that's where you saw it. This is contrary to what I recall
15 you saying at the time, that, yes, it would have originated
16 in Malibu because that's who you use. You did not go down
17 and get the FedEx, and it says on the FedEx receipts that it
18 starts in Malibu, California. The FedEx receipts show it
19 starting in Malibu, California, and you represented you use
20 a service out there, and they prepared the label, and then
21 you tell them where to send it, and then you go.

22 But, in any event, the tracker says it started in
23 Malibu. The receipt that you gave to the Court says FedEx
24 overnight, and it says August 8th delivery. That's all I
25 can tell you. So you can offer the reasons, but that's not

1 what the paperwork shows. The paperwork shows an
2 origination in Malibu, California, and the paperwork shows
3 overnight delivery for August 8.

4 MR. HAYSBERT: So, Your Honor, in response to that,
5 I can assure the Court, because I am here, I'm an officer of
6 the Court currently, I mailed the package myself via FedEx
7 in Virginia Beach directly to Mr. McGavin's office. I never
8 sent anything or called anyone to do anything in Malibu.

9 THE COURT: You didn't, but did somebody on your
10 behalf?

11 MR. HAYSBERT: No. I sent it myself. I sent it
12 via FedEx myself on August 5th, and what I was told by the
13 person at the front desk --

14 THE COURT: Where did the label originate?

15 MR. HAYSBERT: The label originated in Virginia
16 Beach.

17 THE COURT: It was requested from the service. You
18 told the Court that you use a service in Malibu, and that
19 they would then take care of it from there, and then you go
20 pick up the label. Maybe my takeaway is wrong, but whatever
21 you say the paperwork is there, and your own technician
22 explained how it got to Malibu, but it says Malibu.

23 MR. HAYSBERT: I don't know why.

24 THE COURT: The exhibits say "origination, Malibu."

25 MR. HAYSBERT: I don't know why, Your Honor.

1 Seriously, that is something I cannot explain. I can only
2 tell you what I know, and that is I mailed that FedEx
3 package from Virginia Beach at a FedEx store, and I could
4 bring the people in for you to depose tomorrow.

5 THE COURT: No. We have dragged this out so much.
6 It's my determination at this point, it's an accumulation of
7 things, and I can only go on the paperwork that has been
8 admitted without objection, presented by you, and we are not
9 going to start calling in people from FedEx stores. The
10 paperwork submitted by you and what I heard, and I can go
11 back and look at it, is it started in Malibu. So you can
12 stand there all you want.

13 MR. HAYSBERT: I would never lie to the Court.

14 THE COURT: I'm not saying you're lying. All I'm
15 saying is on Friday night you say it's 6:05 in the morning,
16 but, oh, you made a mistake, it was really 9:00 a.m. The
17 paperwork is what it is, and my decision will be what it is.

18 MR. HAYSBERT: Okay. So I'll move on, but, Your
19 Honor, just so that you are aware of what I did, I wanted to
20 make sure that it was clear that I mailed it FedEx myself in
21 Virginia Beach, had nothing to do with Malibu, don't know
22 anything about Malibu.

23 THE COURT: You don't know anything about Malibu
24 and sending FedEx packages, is that what you're telling the
25 Court?

1 MR. HAYSBERT: I'm telling you the truth. I don't
2 know anything about why anything came from Malibu or was
3 sent to Malibu. I never called anybody in Malibu. No one
4 ever called me in Malibu. I sent that FedEx package, and it
5 was a clean transaction. I gave it to the front people.
6 They told me it would be there on the 7th. I paid the \$97
7 and some change, and I left the store. That was it.

8 THE COURT: Did your offices out in California, did
9 they call Malibu?

10 MR. HAYSBERT: My office is not in Malibu. It's in
11 Santa Monica.

12 THE COURT: I know it's not in Malibu, but that
13 doesn't mean they couldn't contact Malibu.

14 MR. HAYSBERT: There's nothing --

15 THE COURT: The paperwork says it originated in
16 Malibu. You claim the paperwork is wrong. All right.

17 MR. HAYSBERT: Your Honor, I can tell you where I
18 mailed it from. I don't know anything else about Malibu,
19 but I mailed it from Virginia Beach, and that package should
20 have been there on Monday, August 7th. Why it didn't get
21 there on time, and why Malibu is involved at all, I have no
22 idea. But I can tell you without a shadow of a doubt that I
23 mailed that package on Saturday, August 5th, at 4:00 p.m.
24 myself and received a FedEx label myself, put it in the --
25 and the guy put it in the package for me and shipped it out.

1 That's what happened.

2 In terms of the remote testimony of Dr. Haider, as
3 I mentioned to the Court on -- at the final status
4 conference, I did not know that Dr. Haider would not be
5 showing up. I told the Court then I had fully paid
6 Dr. Haider for her testimony at trial. She had all the
7 payment that she needed to show up. That was confirmed by
8 her office.

9 So Dr. Haider got in touch with me on, I believe it
10 was Friday, sometime around the settlement conference, and
11 said that she could not make it because her father was in
12 the hospital, or had been in the hospital and was released
13 on August 2nd. So I tried to get her to come, and we had a
14 discussion about, you know, can -- I mean, what can we do to
15 make it possible for you to come? Whatever I can do to make
16 it possible for you to come.

17 And, unfortunately, when the Court required all of
18 the medical information, all this other things, she couldn't
19 do it. So the decision was made to release Dr. Haider from
20 the case. In an abundance of respect for her father and the
21 situation that she was going through, I did not want her to
22 go through the whole, you know, put all of this in an
23 affidavit by 5:00 p.m. tomorrow, or I don't know what is
24 going to happen. So I released her. Dr. Haider, deal with
25 your father. We will move on with the case, and that's what

1 happened. There was no misrepresentation there at all.

2 With respect to the other, the two liability
3 experts, you're right, and you said this on the record
4 before, and Mr. McGavin confirmed it today, I do get to
5 decide what experts or who are my witnesses I want to come,
6 and I made the determination that those experts should not
7 come. I don't know why they were required to have
8 affidavits, but there was no reason to provide affidavits
9 because I made the decision that they were not going to be
10 the most effective for my case, so I removed them from the
11 case and for no other reason.

12 Regarding the subpoenas to Nick Seifert and Marcus
13 Wilson, we had both of them on the plaintiff's witness list,
14 and we attempted, through an agreement, to get these people
15 here without having to proffer a subpoena to them.
16 Unfortunately, Mr. McGavin refused to agree to allow those
17 witnesses to be called in our case in chief, and he has that
18 right. But then at that point it's up to me to decide what
19 to do next.

20 Now, I understand the local rules, and I understand
21 the federal rules. There is a good cause element of those
22 rules. The good cause element of those rules allow the
23 Court to decide on its own, in its own discretion, to allow
24 the person subpoenaed to come forward and take testimony of
25 that person or not. It is up to the Court, but I shouldn't

1 be penalized, not for a technical violation of the rules,
2 but what I was trying to do is simply bring witnesses to the
3 Court, who are already in Virginia Beach, they live very
4 close by, they were already on the witness list, they were
5 on -- they were on Mr. McGavin's witness list. They were
6 already on the subpoena. They were subpoenaed all the way
7 through Friday. For us, this wasn't -- this isn't like
8 bringing in Dr. Haider from Texas. These folks are local.
9 There might be good cause to bring them in despite
10 everything that we didn't do.

11 THE COURT: I ruled upon that in both cases. I
12 granted you Mr. Seifert, and I made my ruling clear on
13 Mr. Wilson today and the fact that I did not find good cause
14 because it was a repetitive violation that you had been
15 warned about before, but go ahead. I have already made my
16 rulings on those two.

17 MR. HAYSBERT: Understood. Your Honor, that is the
18 point. You made your rulings on it, and it will lie there.
19 What I'm concerned about is that my very integrity and my
20 ability to practice is being called into question because of
21 a rule that you get to make and that you've made. It's
22 already been made, and you have the option to do that.
23 That's what the rules are there for. That's why they say --

24 THE COURT: I have to make the rulings, I said over
25 and over to you. He calls it the gatekeeper. I seem to

1 think of it as a referee. You call balls and strikes, but
2 you have to do it under the rules, the applicable rules, the
3 federal rules, the local rules, and the law. That's what
4 the Court is endeavoring to do. So I have made my ruling
5 abundantly clear on both of those, and I stand by those two
6 rulings.

7 MR. HAYSBERT: I stand by it as well, Your Honor.
8 That's where I believe it should lie. I don't think that
9 that should be something that should bring my ability to
10 practice before the Court.

11 THE COURT: Maybe it is not just one thing. Maybe
12 it's the accumulation of all of these things, and the
13 cumulative effect where it just keeps happening and
14 happening and happening after you've been told.

15 MR. HAYSBERT: I appreciate that, Your Honor. I'm
16 endeavoring to go through one at a time so I can explain to
17 the Court.

18 THE COURT: You can certainly, and then I'm going
19 to give you a two-page typed written list that I have, maybe
20 some of the things that you've already said. Actually, it's
21 a little over two pages typewritten, just my brief, being
22 able to go back through my notes and the transcript, and
23 I'll let you respond to all of that.

24 MR. HAYSBERT: Sure. Okay. Mr. McGavin mentioned
25 my overtaking the Court, interrupting the Court. My sincere

1 apologies for that. I'm endeavoring to do better about
2 that. I believe the Court will see that I'm trying to do
3 that. I know in the beginning, in an effort to be heard, I
4 was overzealous to try and represent my client, but, Your
5 Honor, under no circumstances was I trying to be devious or
6 deceptive or act without integrity or to intentionally
7 disrespect you, and that was never my intention. So I would
8 hope that you understand that. It was only an attempt to
9 be -- to zealously defend my client's rights and for no
10 other reason, that I may have interrupted Your Honor a
11 couple of times and said things that were not appropriate at
12 the time.

13 With respect to the outbursts in court, I
14 apologized to Your Honor then. To explain my emotion, I
15 felt as if I were between a rock and a hard place with this
16 witness. I was trying to simply get information into the
17 record the Court could use to make its determination
18 regarding a very important witness, Dr. Filler.

19 I was between objections, and all these sort of
20 things, and I just wanted him to get out his opinions, and
21 when he was finally able to do it, I was very happy, and
22 that was my expression and for no other reason. So my
23 apologies for that outburst, but I was very happy about the
24 fact that I had been able to get through and get it out
25 because it was so difficult to do, in my opinion.

1 On disrespecting the Court and the jury, I've
2 spoken to the Court about disrespecting the Court. I have
3 endeavored not to disrespect the jury. I can understand one
4 would make the argument, well, because we have had delays,
5 and all these sorts of things, and because these witnesses
6 are being brought in, and that sort of thing, you know,
7 that's disrespect to the jury. And if that's -- Your Honor,
8 if you believe that I'm the one who's delayed this trial,
9 and I'm the one who's done all that, then I apologize to the
10 jury for disrespect. I meant no disrespect. I'm simply
11 trying to defend the interest of my client.

12 On Friday there was an issue about the subpoenas
13 for Marcus Wilson and that being incomplete. I had been
14 informed that the subpoenas were being served, and I believe
15 it had been served, because I saw Ms. Alicia Eleftherion,
16 she came to the witness stand. I believe I saw Marcus
17 Wilson as well. So I believe I made that point to the Court
18 earlier. So I don't understand what the issue was with
19 Friday other than, again, my apologies to the Court for the
20 delay in getting the proof to service of any sort of proof.

21 Typically don't work that fast. I have never
22 received typically a proof of service the same day that the
23 documents have been served because the person who is out in
24 the field is not the people I'm corresponding with at my
25 local office. So they have to correspond with those people

1 in the field, and they won't have the ability to sign a
2 proof of service and do those things in a timely manner that
3 the Court wants. But we were able to get the Court the
4 proof of service on Sunday before 3:00, and we filed that.

5 THE COURT: Well, I haven't looked at it directly.
6 You may have said you believe they had been served, but the
7 issue is really the violation of the rules that we had
8 already been through before and the late service of the
9 subpoenas. The real issue is violation of the local rule,
10 which ties onto the Federal Rule, and so, consequently, you
11 may have said believe, but then we had to sit here for
12 however long the record will reflect and wait while you
13 confirmed or did whatever you were doing.

14 So I'm just saying it left the impression with the
15 Court that they had been served, and that's what the Court
16 was concerned about.

17 MR. HAYSBERT: Understood. I'll end with that,
18 Your Honor, because I think the more significant issue here
19 is the subpoenas, from what I can see of what Mr. McGavin
20 said, and I want to be clear about this. My understanding
21 of the rules is that you first start with the threshold
22 question as the attorney, do you believe you have good cause
23 to serve a subpoena within -- within the time strictures or
24 outside of the time strictures provided by the rules. I
25 believe that there was good cause, Your Honor, and I

1 articulated good cause for both Alicia Eleftherion, for
2 Marcus Wilson, and for Nike Seifert.

3 That's where the analysis starts for me as the
4 attorney, looking at what has to be done. My analysis was,
5 is there good cause for us to submit these subpoenas, and if
6 there is, we will put them in. Ultimately, it's up to the
7 Court to decide whether there is good cause, and it's at
8 your discretion to decide that. But, Your Honor, what I'm
9 saying is, in my position, I'm not deliberately attempting
10 to violate rules. I see them. I know they say 14 days.

11 THE COURT: That's going to be up to the Court to
12 determine whether there has been deliberateness in violating
13 rules. But I think we have gone through the subpoena issue,
14 and I've made my rulings on there. I did not find good
15 cause, and I allowed you to have Mr. Seifert, but you still
16 knew the time limits. The issue with the Court is the
17 timing of it and not having at least advised the Court when
18 you knew you had done that that morning, and you say 6:05
19 a.m. and now it's now 9:00 a.m., and all of that that we
20 went through. Certainly, somebody knows the difference when
21 they are doing something at 6:00 in the morning and 9:00 in
22 the morning. Be that as it may, the subpoenas are just one
23 thing. They are not the only or the main.

24 MR. HAYSBERT: Understood. So the 6:00 and 9:00,
25 again, this is California time versus Eastern Standard Time,

1 so I apologize for the Court for not clearing that up.

2 THE COURT: Again, you said you were confused?

3 MR. HAYSBERT: I sent them at 9:00 even.

4 THE COURT: When you were here, you were confused,
5 you said?

6 MR. HAYSBERT: Yes.

7 THE COURT: You had everything mixed up with timing
8 when you were here before the Court on Friday?

9 MR. HAYSBERT: Correct. Being under the gun like
10 that, yes, I made the representation that 6:00 a.m., and I
11 was confusing Eastern Standard Time versus Pacific Standard
12 Time. So I sent them out at 9:00 Eastern Standard Time,
13 which is 6:00 a.m. Pacific Standard Time.

14 THE COURT: You clarified it now, but you didn't
15 clarify it on the record then. You clarified it when the
16 Court has made an issue of this and was determined to find
17 out the saga of the subpoenas that were being served all
18 day. Three of them apparently were served on Friday, so,
19 anyway.

20 MR. HAYSBERT: I have no issue with that, Your
21 Honor. I was born to a woman much like you. So I
22 understand that you want things done in a certain way, and
23 that you have your order, you want to get to the bottom of
24 things. I have no problem with it because I know I haven't
25 done anything wrong. I simply wanted to, for the subpoenas,

1 issue them because I believed there was good cause, and at
2 the end of the day the Court has made its rulings, and I
3 believe it should end there.

4 With respect to litigating in this court, Your
5 Honor, I'm honored to litigate in this court on behalf of
6 someone that I care deeply about. I'm very honored. I'm
7 from Virginia. I was born here. I was reared here, and I
8 deeply understand where I am. I honor and respect where I
9 am. I honor and respect you. So if I've done -- whatever
10 the decision you decide to make, if I have done anything
11 that has been disrespectful towards you, the Court, the jury
12 or where we are, then I would like to apologize for that.

13 Thank you very much, Your Honor. Do you have any
14 questions for me, I'm happy to take them now or however you
15 like.

16 THE COURT: You can be seated, and I'll give you a
17 list of things that I have been able to determine through
18 the record, because I have concern over the cumulative
19 effect of these numerous violations of the local rules, the
20 federal rules, and the rulings of the Court, and I'm going
21 to just go through some of them briefly. When I finish, you
22 can respond, and Mr. McGavin, if he wants to make any
23 response.

24 These are just examples that I've been able to come
25 up with through an examination of notes and some transcripts

1 over the weekend, as much as I could. I would just note
2 that in a criminal case, I think I tried a major criminal
3 case, it was at least two weeks, only a thousand pages of
4 transcript, and already there is 6 or 700 pages here now.
5 So that tells you how much talking and delay that there has
6 been in this case, why a lot of those pages are with delay
7 and discussing all of these rulings.

8 These are the examples that the Court has. You
9 attempted to get Dr. Haider's video demonstrative before the
10 jury through Dr. Filler, who did not prepare it and when you
11 knew there were outstanding objections by the defendants.

12 Now let me mention something about this animation.
13 Number one, the Court had not admitted it. The Court had
14 taken it under advisement. It was never admitted. There
15 was no foundation put in for Dr. Filler. Number one, I note
16 that both reports of Dr. Filler and Dr. Haider were dated
17 the exact same day, September 18, 2020.

18 Number two, there was nothing on the animation,
19 which I viewed, and nothing in the record to show the date
20 of that animation. Could have been well prepared after the
21 reports because it was prepared as a demonstrative exhibit.
22 It was not part of her report. It was prepared as a
23 demonstrative exhibit. It had never been admitted, and
24 there had been no foundation laid of who made it and when
25 they made it. So there was no foundation whatsoever,

1 regardless of it not being produced and it going back and
2 forth. The Court was concerned with you trying to get in
3 that particular demonstrative through Dr. Filler that had no
4 foundation on the record whatsoever. He had only in his
5 report said that Dr. Haider was a referring physician and
6 the indicative part of it, but there is no reference to any
7 brain animation, and both reports are filed on the same day,
8 and nobody knows who made that brain animation. I can only
9 assume, but I haven't heard from her, was Dr. Haider.
10 Nobody knows when it was made, whether it was even made
11 after his report.

12 So there was no way that the Court could let that
13 in without having proffers through Dr. Haider that she had
14 made it, when she had made it, had she shared it. There was
15 just no foundation there, and it had not been admitted, and
16 you were trying to get it in. That's when the doctor said,
17 well, I didn't do that.

18 Now, I don't know if he went further to say he
19 hadn't seen it, but I don't think there is anything in the
20 record that indicates that he did see it. But whatever it
21 was, there was no foundation, nothing to admit that, and you
22 were trying to get it in. Now, that is just sneaky. That's
23 what it is.

24 Then what happens is you have Dr. Filler's
25 demonstrative, there was an objection to that, and you were

1 specifically told to get all of the references to his court
2 appearances and his witnesses out of there and have it to at
3 least to the Court and to counsel by Friday. I believe
4 that's in the transcript, and that was not done.

5 Then when you showed it, I noticed something else.
6 Everybody was quickly going through it, and the
7 demonstrative will show only the lines on the page were
8 deleted. The title was not. I'd have to pull it out, but
9 you know, times appeared in court and so forth. It was just
10 being run through very quickly. But the headers were not
11 taken off of those pages. The pages were not eliminated.

12 I never got a good explanation of why it hadn't
13 been done, and even your computer person said, and I know
14 enough about PDF documents to know that you can eliminate
15 pages like that. So no explanation was ever given to the
16 Court about why it wasn't produced in advance. It was run
17 through very, very quickly, and I could see the headers. I
18 went back and looked at it, and it has the headers, and that
19 will show in the record. I noted it had been prepared for
20 deposition, and the Court ordered that update. It simply
21 was not properly redacted according to the Court's
22 instructions. Then again the issue with the animation.

23 Another example is you tried to, allegedly, impeach
24 a witness with a work order, which the Court had reserved
25 ruling on, even though the seemingly real purpose was for

1 the work order to prove negligence, culpable conduct, or a
2 defect. I know that that's an issue before the Court, but
3 you should have brought that up to the Court before you did
4 that. You should have brought it up to the Court, and that
5 was not an admitted exhibit.

6 Then you say publish it to the jury. Then you
7 proceed to explain to the Court. I've got that somewhere
8 here, and I'll come back to it if I don't, that the Court
9 had to let it in, and that's not what the rule says. It's
10 up to the Court whether to let it in. You left out that
11 second paragraph of the rule, the one I read into the
12 record. I'm not going to read the rule now to take up time,
13 but it's not required. The implication was the Court was
14 violating the federal rules because you only cited the part
15 that you liked. You didn't go on to cite the rest of the
16 rule.

17 I had to walk you through on multiple occasions
18 about adverse witnesses and laying a proper foundation.
19 After I went through it the first time with you, you then
20 did it two more times. You announced in front of the jury,
21 when Mr. Seifert came in, I, referring to yourself, I'm
22 declaring him an adverse witness, something to that effect.
23 You did the same thing with Mr. Chase, something about it
24 was your pronouncement -- I don't have the exact words --
25 that they were adverse witnesses. We had previously gone

1 through all of this with Ms. Eleftherion, that there is no
2 adverse witness rule, and if a witness turns hostile, what
3 you do is you have a sidebar with the Court, or you say
4 there is a matter you need to take up with the Court. Then
5 you say that the witness has turned hostile, and you get the
6 Court's permission to go into a cross-examination mode, and
7 I told you that specifically. Then what did you do? On two
8 witnesses you then announce in front of the jury, after we
9 had gone through that. So three times I had to go through
10 the adverse witness procedure with you, and after I had
11 thoroughly gone through it with you, and I could overlook
12 the first time, even though they are the federal rules, and
13 they're not local rules, I had to go through it two more
14 times, and you said it in front of the jury.

15 You never laid a proper foundation for them being
16 adverse, and as I noted for Ms. Eleftherion, she never
17 turned adverse. You announce in the beginning that that's
18 what she is, but she never really turned adverse. The point
19 is not her but that I had gone through it twice; once with
20 you, and then you did it twice more, as if you were just
21 ignoring the Court. I can't cite every time, but there are
22 so many times that the Court made a ruling, and you just
23 turned around and asked the question. Nobody can object
24 every time asked and answered. But you kept badgering down
25 on witnesses to be sure you got the answer you wanted, even

1 though it had been asked and answered, and the Court had
2 ruled on some of that. I can't give you specific examples.
3 I just know the record will reflect that when one goes
4 through it, that the Court would rule, and you'd keep right
5 on going. A good example of that was the adverse witness
6 rule.

7 I have here, having witnesses repeat their
8 testimony and answer the same questions over and over, and
9 that, consequently, is badgering a witness. Yet, you would
10 argue later, well, you know I'm prejudiced because I was
11 always called down for badgering witnesses, but it was. It
12 was just asking the same questions over and over. We went
13 through so much of that camera up and down, and that's
14 something else. At least it's my understanding that the
15 only thing that camera captures is the front door and the
16 hostess stand. It wouldn't have even captured the slip and
17 fall.

18 Now I'm assuming that the defendants would get to
19 that, but the impression that's been left is that somehow
20 the camera tape was destroyed or gone somewhere to, quote,
21 risk management, and that it would have captured the fall.
22 But the testimony is the camera gets the front door, and it
23 gets the hostess stand, and then you showed the picture of
24 Dr. Haysbert, and she is standing at the entrance. Well,
25 that's where the camera would have captured it.

1 There has been this, again, constant inference, and
2 that inference is not a correct one. Now, you can ask them
3 if they examined the footage, but to keep inferring that had
4 they examined it that it would have caught the slip and fall
5 is just incorrect under the evidence.

6 I had on here the same as Mr. McGavin had put,
7 failing to come prepared with necessary hard documents after
8 the Court had asked for them, and then wasting over 45
9 minutes of the Court's time on two occasions with at least
10 45 on the FedEx receipt, and then again on the Wilson
11 subpoena incident. These are the things that are taking so
12 much time that we are not getting through the trial, and it
13 creates the cumulative effect, and it's the cumulative
14 effect on a jury.

15 The violation of the subpoena rules after you had
16 been specifically told. You know you should have told the
17 Court. It's just not your decision to say, oh, I've got
18 good cause, I'm going to do this. The other thing is,
19 issuing a subpoena to Dr. Haider, your own witness, which
20 you knew would be unenforceable, and you admitted that
21 before the Court. You knew it was unenforceable. It was
22 unenforceable because it was not within the service area of
23 the Court. But you said something to the effect, well,
24 she's not a lawyer, she won't know. So that raises
25 tremendous questions in the Court's mind, is that what you

1 are doing with these subpoenas, getting subpoenas out to
2 people late because they don't really know, and they will
3 think Judge Smith and the Court is requiring these subpoenas
4 for them to be here. That is of concern to the Court when
5 something like that happens, and you said that about your
6 own expert witness. I was just shocked when you said that.

7 I mentioned the subpoena issue. I mentioned the
8 FedEx receipt and the paper documents. Just totally
9 unprofessional conduct. This isn't a television program
10 where somebody says an ah-ha, got you, and raises their
11 voice and slams paper down. You slammed papers down and
12 made outbursts, extreme on one occasion. It was here, it
13 was right by the microphone when you slammed the paper down
14 at the end of the witness, and I called your attention to
15 it.

16 But during these outbursts, particularly the first
17 one, I could see my courtroom staff particularly, and I
18 could see the jury, and, frankly, people were visibly
19 nervous. They were visibly nervous. I will tell you, I had
20 my hand down towards my panic button to call the marshal,
21 and I didn't because I knew if the marshal came in, it would
22 result in a mistrial because this courtroom would have been
23 flooded with people coming in when a judge pushes a panic
24 button. We all have one, and I was on the verge of pushing
25 that button.

1 Then when the court reporter was asked to read the
2 questions through, things calmed down a little bit, but she
3 was nervous. She's been my court reporter for so long I
4 can't remember. You know what? I know when her voice is
5 shaking. She was rattled. Everybody was rattled. You did
6 it in front of the jury, and there's just no excuse for that
7 kind of conduct. You do have an intimidating presence
8 through your height and your build, and then to have that
9 outburst like that, it really made everybody, and at least
10 everybody that I could observe in the time, and I
11 don't recall but one other time in my career where I have
12 reached for the panic button, one other time. Frankly, I've
13 been on the bench for 38 years, and I've never reached for
14 that panic button. One other time, I was there, but this
15 time I was almost pushing it.

16 The representations to the Court about the FedEx
17 shipping situation, we've been through that. Leading the
18 Court to believe that Dr. Filler had created a brain map
19 demonstration, at least that's what I thought when you were
20 going to put it in until he said, well, I didn't prepare
21 that. I don't know if he seen it or not, but I don't even
22 know who prepared it, when he got it, did he get it before
23 his report, and the reports were both filed on the same day,
24 and that was supposedly a demonstrative for Dr. Haider. So
25 one can draw inferences from that that the demonstrative was

1 prepared. I don't know if her deposition was taken, but the
2 demonstrative would have been prepared, unless it was at a
3 deposition. Was her deposition taken?

4 MR. HAYSBERT: No, Your Honor.

5 THE COURT: So there is no evidence that it was
6 prepared for a deposition. So I don't know when it was
7 prepared, for testimony? That's what I would assume, it was
8 a demonstrative.

9 We have been through the misleading about the
10 timing of the subpoenas. I felt that was all very
11 misleading on Friday night and time-consuming.

12 Again, you've mischaracterized witness testimony in
13 an attempt to impeach the witness or making small omissions
14 or inconsistencies, and I'll give you an example. First of
15 all, I don't know how many times I had to explain how you
16 impeach with a deposition. I'll tell you how it ended up,
17 that I just read them all. First of all, I told you, you
18 have to first identify the deposition. Then you have to
19 identify the lines that you want to use. Then you give it
20 to the Court, and the Court determines whether it's
21 impeaching or not. If the Court says this isn't
22 impeachment, you can't even give it to the witness. But I
23 went ahead, and I would say, there was only a small portion
24 in there that was impeaching. Most of it was not. So,
25 consequently, I just said, we are never going to get through

1 this trial. I'm just going to let the witness read it, and
2 we will read it into the trial, and the jury can make the
3 decision, because no matter how many times I told you, you
4 got up there with the deposition, and you didn't identify
5 the deposition, you didn't identify when it was taken. You
6 didn't ask the person, did you give this deposition on such
7 and such a date? You have to lay a foundation.

8 I went through that numerous times with you, and
9 you never did get that right. Finally, I knew that the
10 trial had to move on, so just let the jury hear the
11 testimony, let the jury hear what you think is impeaching,
12 and they can make their own decision. So that's the way I
13 finally resolved it, but that was not the way to impeach a
14 witness. Frankly, if you're refreshing recollection, I
15 stretched it a little to even include that. You show the
16 person the document, they read it, and you say, "Does it
17 refresh your recollection?" If they say no, you don't get
18 the document in. If they say yes, they turn the document
19 over, and you say, "How does it refresh your recollection?"

20 Another mischaracterization, and I mentioned this
21 on the record outside of the presence of the jury on later
22 Friday. But Mr. Robinson testified that Mrs. Haysbert was
23 in the Outback Steakhouse for five to ten minutes on the
24 floor. I have gone back and looked, and you specifically
25 then just tweaked it, changed it, and made it 20 minutes. I

1 think jurors notice things like that, frankly. Jurors
2 observe, and they're smart, and they see things like that.

3 Then you again claimed to be impeaching
4 Mr. Seifert, but there was no material inconsistency in his
5 statement when asked why his name was on the work order.
6 That was properly explained. But at some point it just
7 became, no matter what our rules and no matter what I told
8 you how to use depositions, you didn't consult with local
9 counsel, and the local counsel didn't come over and write
10 you a note and pull on your sleeve, he just sat there.

11 I'll mention that you saying the Court had to admit
12 remedial measures for certain purposes, and as we went
13 through that, if the word is "may." It doesn't say "shall."
14 I do agree, it's hard for a record sometimes to reflect, but
15 you were repeatedly, particularly more towards the
16 beginning, interrupting the Court and opposing counsel and
17 witnesses, and being extremely combative, certainly not with
18 Dr. Haysbert or Mrs. Haysbert but with some of the witnesses
19 that were from the Outback.

20 At one point early on, and all the Court is doing,
21 oh, I remember one, the compound question issue. You jump
22 up and say, "Compound question." There was nothing compound
23 about that question. Then Mrs. Haysbert picked up on it.
24 It's like you're signaling the witness, and she picks up on
25 it and says, "Well, I don't understand that question." So

1 there was nothing compound. It was one question. There was
2 no compound question in there.

3 I ruled, and those were the kinds of things, you
4 just jumping up, objecting to something. I don't know what
5 you were trying to do, just stop the testimony or whatever,
6 but you did that. At one point early on you accused the
7 Court of trying to catch you in something. Frankly, it's
8 been shown that there were a lot of inconsistencies and
9 misstatements. The Court wasn't trying to catch you in
10 anything. As the Court told you, it is just trying to get
11 through this trial and have the rules be followed, the local
12 rules, the federal rules, Federal Rules of Evidence, Federal
13 Rules of Procedure.

14 All the Court was doing was ruling on objections
15 and rules and trying to make this an orderly process,
16 whether you be a gatekeeper or a referee. I know I'm very
17 aware that revoking an attorney's *pro hac vice* status is a
18 harsh sanction. But the problem is, when a case has become
19 so affected with all of these red herrings, misleading, all
20 these things that I mentioned, at some point it just becomes
21 a continuum, and it's an accumulation and a repetition of
22 the same thing over and over after there have been
23 objections and the Court has warned you.

24 So those are the things that I was just able in
25 preparing for all of these motions, because there were many

1 to prepare for. We were working here all weekend. So those
2 are the things, and you can have an opportunity to respond
3 to any of them that you wish, and likewise, Mr. McGavin, you
4 can make a response to any of them.

5 MR. HAYSBERT: Thank you, Your Honor. So go
6 through as many as we can. Regarding the brain animation,
7 this was a demonstrative. It was created from the scans
8 that Dr. Filler created when he examined the plaintiff's
9 brain. So that's all it was, is animating his images and
10 putting it in a form where you could view it differently.

11 THE COURT: He said he didn't create it.

12 MR. HAYSBERT: He did not create it. He created
13 the images that provided the basis for the animation. So he
14 didn't create the animation himself. That's not what
15 someone like Dr. Filler has an expertise in. I didn't even
16 create it. It was created through a company that takes the
17 images and then fashions them into a demonstrative.

18 THE COURT: So Dr. Haider hadn't created it,
19 either?

20 MR. HAYSBERT: It was never Dr. Haider's
21 demonstrative. I know we -- I heard Mr. McGavin say that at
22 one point, but it was never her demonstrative.

23 THE COURT: You had it on the list as being a
24 demonstrative for her.

25 MR. HAYSBERT: It was a demonstrative but not -- it

1 was for both of them to be able to utilize for different
2 reasons, for different purposes, because they are coming at
3 it from two different perspectives.

4 THE COURT: Well, now you clearly didn't lay a
5 foundation if you had some company create it, but I'm just
6 going to let you explain, and then I'll decide whether the
7 explanations are just more excuse or really a legitimate
8 explanation. Now you are telling the Court for the first
9 time that a company created this, and that Dr. Haider didn't
10 create it. But I know you had listed it for both Dr. Haider
11 and Dr. Filler, but when you asked Dr. Filler, he said, "I
12 didn't do this."

13 MR. HAYSBERT: He didn't create it, but what he
14 wanted to do, instead of focusing on the whole animation,
15 was take me directly to the image because he recognized we
16 are under the gun, there is no jury in the room, take me to
17 the image.

18 THE COURT: You don't know what he recognized.
19 That would have been in his mind. The Court is the one who
20 said, okay, what did you rely on?

21 MR. HAYSBERT: I think we were both feeling the
22 pressure, and I think that based on that, he said, "Let's
23 just go directly to this image here that I have, and let's
24 just talk about that," because that image clarifies the
25 position that he has, and that is that she suffered a

1 physical injury to her brain, and you can see it, and he
2 wants to describe it. He said, "You see how the fornix is
3 perfect except for this area here? Well, that had to have
4 happened through a sudden impact." He didn't need the
5 animation to show that. He wanted to go directly to it.
6 That was all that was.

7 THE COURT: It was the Court who asked did he have
8 anything of Dr. Haysbert's brain and to go directly to it.
9 It was the Court that gave that instruction.

10 MR. HAYSBERT: Yes. Okay. So the foundation would
11 not have -- would not need to be brought in through Dr.
12 Haider. She didn't create the images. These images were
13 created by him, and these are images that were part of her
14 brain, right. So those images were just fashioned into an
15 animation, and that was the brain animation.

16 THE COURT: He said he didn't do it. If someone
17 says they haven't done the exhibit, and there is no
18 establishment that he had relied on it or used it. I mean,
19 you had to lay a foundation before you could let it in.
20 That animation, it's even worse now that I hear that some
21 company did it, and I don't know when they did it or what,
22 but they are not here.

23 MR. HAYSBERT: It didn't come in anyway, so I think
24 the issue should moot itself by the fact that it wasn't
25 allowed to be shown to the jury, and he went directly to the

1 picture, and that's where we ended.

2 THE COURT: The time that's been extended on all of
3 this. This is a slip and fall case. I'm not saying the
4 injuries aren't serious, but it's a slip and fall case in
5 Outback Steakhouse. It shouldn't be taking this kind of
6 time, because things have not been presented timely to the
7 other side, timely to the Court, and the local rules and the
8 federal rules are not being followed, even after a warning.

9 MR. HAYSBERT: So, Your Honor, I attempted to have
10 Dr. Filler testify as to these images through the format of
11 the demonstrative. They were stopped by the Court.
12 Dr. Filler referred to the piece of paper, and so we never
13 went that far. I'm not a sneaky person. I wasn't trying to
14 sneak anything in. I'm not that kind of person.

15 So I wanted him to reference it. It was created.
16 It was created based on his images. I thought it was a
17 really powerful piece of evidence, and I thought he would
18 speak to that one. Now, he said -- I think he said, because
19 I haven't looked at that part of the deposition, that he
20 didn't create that, but he had definitely seen it before.
21 In fact, I know he saw it because his office told me that he
22 did via e-mail.

23 THE COURT: That's hearsay. That's an e-mail. You
24 never asked the question of him, "Have you seen it, and did
25 you use this for your opinion?" You never asked him had he

1 seen it when he said he didn't create it, and there was an
2 objection, I think, and I sustained it, you moved on.

3 MR. HAYSBERT: Yes, ma'am.

4 THE COURT: You never established that he had
5 looked at it.

6 MR. HAYSBERT: Understood. I wanted to move on,
7 Your Honor, given everything that I've shared so far, but,
8 yes, we never got there.

9 The date of the animation would be -- the animation
10 was created something separate from the date the images that
11 cause an animation to come into being were created. We know
12 those dates because those dates are --

13 THE COURT: They're not on the record. They
14 weren't on the record.

15 MR. HAYSBERT: You mean the image?

16 THE COURT: You are just representing things that
17 you know. But if it's not on the record, how can the Court
18 know?

19 MR. HAYSBERT: Well, he did indicate in his
20 testimony the date that the images were done, because we
21 were trying to make the determination whether or not it
22 happened before the car accident or after, and that's when
23 he specified the date that the images were done.

24 THE COURT: You are talking about the MRI or his
25 image that he had done. He explained the difference between

1 the three forms of MRI and how his, what is it --

2 MR. HAYSBERT: DTI.

3 THE COURT: -- DTI worked and that it was the high
4 form. We heard all that.

5 MR. HAYSBERT: Right. And the DTI images are the
6 ones that you see in his report that are animated into the
7 brain map, is what I'm sharing with the Court.

8 THE COURT: But he said he had never seen it or he
9 said he didn't prepare it.

10 MR. HAYSBERT: Yes, which is correct, but he had
11 seen it.

12 THE COURT: We didn't get to that.

13 MR. HAYSBERT: Okay. Perfect.

14 So you made a reference that I attempted to impeach
15 a witness with a work order that the Court had not yet ruled
16 on. So the work order that you're referring to is work
17 order 1 on the exhibit list. That is one the Court had not
18 yet ruled on. We had work order 2 as an impeachment
19 evidence, and we believe that she impeached herself, and
20 that is when we attempted to impeach her with the work order
21 2.

22 THE COURT: Which never showed the Court the
23 document.

24 MR. HAYSBERT: I did. I provided it.

25 THE COURT: Yes. You started right into

1 impeachment, and we argued the rule. Anyway, the record
2 will reflect exactly what happened.

3 MR. HAYSBERT: Okay. Your Honor, if I implied that
4 the Court violated the federal rules, my apologies. I never
5 meant to do that. I was simply arguing on behalf of my
6 client a piece of evidence that we believed had impeachment
7 value, and we thought should come in. It is the Court's
8 ruling on that.

9 I do have to apologize regarding the adverse
10 witnesses. I know I heard you tell me once you don't have
11 to do that. There is some -- there is a rule here that it's
12 not -- I did it again, Your Honor -- and I did it again,
13 Your Honor, and I want to apologize the mistake I made. It
14 was on my list, and I read the first thing that I saw there,
15 and that was a mistake. It happened twice, it did not
16 happen three times. It happened twice.

17 THE COURT: It happened twice after I had explained
18 it to you. I explained it to you with Ms. Eleftherion, and
19 then it happened twice after that with Mr. Seifert and
20 Mr. Chase.

21 MR. HAYSBERT: Regarding badgering the witness,
22 Your Honor, you have brought up the issue of Christopher
23 Robinson. I recall Christopher Robinson saying at one point
24 20 minutes. He had changed his answer several times and
25 went from 5 to 10 to 10 to 15 to 15 to 20. I don't have his

1 testimony, but I believe that that's there, and that's why I
2 reference the question again. It wasn't to be sneaky. It
3 was to provide him -- you know, you said 15 to 20 minutes,
4 and that's what I believe was his prior testimony. That's
5 why I mentioned it. I would never, again, sneakily try to
6 get it -- it was actually better for me for it to be 15 to
7 20 minutes, but I impeached him to say it was five minutes.
8 I'm not trying to hide anything or be sneaky.

9 You understand what I'm saying? He was talking
10 about how long the plaintiff had been on the floor.
11 Everyone could agree being on the floor for 15 or 20 minutes
12 is worse than being on the floor for 5 minutes. I was
13 simply trying to get his testimony the way that he had
14 described it to me, and he confirmed it.

15 Regarding taking up the Court's time, 45 minutes
16 for the FedEx receipt, that's a mistake of mine. I mean, I
17 had to go to a local print shop and call FedEx and have them
18 print it, so it took some time. Nowadays, I have a printer
19 in the car. For the Wilson event, 45 minutes as well. I
20 wanted to get the Court the service, but, unfortunately, I
21 couldn't get that to the Court. That's what you wanted, and
22 I couldn't get that to you. I can only give you the next
23 best thing, which was a status of service on them and a
24 verification from my process server that he had been served
25 and the specific date and time that he had been served.

1 Regarding Dr. Haider, I know we have talked about
2 this several times. I never, and if I misstated something
3 in my prior testimony to the Court, through my apologies,
4 but I never provided that to her so that she could think
5 this is a valid subpoena, and this is supposed to make me
6 come to Virginia.

7 We already knew her father was in trouble, and for
8 me it was, if anybody should have anything to say to you
9 about where you have to be, should you decide to come, we do
10 have -- we have this information for you. I can send it to
11 you so you can have them look at it. It was never -- it
12 was, this is supposed to be a valid subpoena, this is
13 something to be something that you have to serve, you know.
14 It was nothing like that. But I wanted to give her some
15 information so they could look and see, okay, there is a
16 court process happening, and if you have to be there, fine.
17 But it was never to be served.

18 THE COURT: So you sent out a subpoena with the
19 Judge's name on it, the court, the date, signed by you, with
20 no intention of ever having it served because you can't have
21 a subpoena served over a hundred miles, and my recall is you
22 thought that might make her appear.

23 MR. HAYSBERT: No, it was never --

24 THE COURT: Something to that effect. All I'm
25 saying is that you sent a subpoena to your own expert

1 witness that you knew was not a valid subpoena, and now you
2 are saying you really never had any intention of having it
3 served.

4 MR. HAYSBERT: We never served it. It was no
5 intention --

6 THE COURT: But you couldn't serve it.

7 MR. HAYSBERT: True, but we never served it, and we
8 never intended to do so. It was to provide her with
9 information to give to whoever she needed to provide it to
10 to let them know what she had to do or what she might be
11 doing at a particular date and particular time. It was
12 simply for her information.

13 Your Honor, I do want to apologize for making your
14 office and the Court nervous. That wasn't my intention to
15 do that. Again, I was happy in the moment. I wasn't upset
16 or angry or was trying to do anything that would threaten
17 anyone in the courtroom, and especially not you, Your Honor.
18 I would never want to do it. I worked for a federal judge.
19 I was a law clerk for the chief judge of the Western
20 District of Oklahoma, and she was a female, first
21 African-American female.

22 I understand what you go through from the back, and
23 I would never want to put you or anyone in your courtroom in
24 a position to feel threatened or to be nervous.

25 THE COURT: Were you an intern or a term law clerk?

1 MR. HAYSBERT: I was a law clerk.

2 THE COURT: For a year after you graduated from law
3 school?

4 MR. HAYSBERT: No, this was during law school.

5 THE COURT: It was during law school?

6 MR. HAYSBERT: During law school.

7 THE COURT: You would have been considered what's
8 called an intern.

9 MR. HAYSBERT: Correct. I take that back. I was
10 an intern for Judge Vicki Miles-LaGrange.

11 So the part about the television program, the
12 dramatics, Your Honor, I'll tone that down. I was in the
13 moment, and that was something that I thought would help
14 keep the attention of the jury on what I was trying to get
15 them to see. Thank you for confirming for me how to impeach
16 for the deposition and refresh prior recollection. My
17 apologies for getting that wrong.

18 Regarding Nick Seifert, I believe that there was an
19 impeachment issue because Nick Seifert represented on the
20 stand he didn't know why his name was on the work order.
21 When I asked him the same question at his deposition, he
22 said my name was on the work order because I'm the joint
23 venture partner. Okay. Well, now you are saying I don't
24 know, and before you said you were the joint venture partner
25 and that's why your name was on that order, as if you run

1 the show there and at a number of other Outback Steakhouses,
2 then I'd like the same attitude. I want the same
3 information provided to the jury, and that work order was
4 something that your name was on because you are the joint
5 venture partner.

6 THE COURT: He said he guessed, and then he did the
7 time frame of his joint venture, but, anyway.

8 MR. HAYSBERT: That's why I thought it held some
9 impeachment value. Ultimately, you get to make the decision
10 on that.

11 THE COURT: Well, I'll let the jury hear and decide
12 it, if it goes that far.

13 MR. HAYSBERT: That is correct, and I appreciate
14 that.

15 Regarding the subsequent remedial measures issue,
16 I'm glad that Your Honor gave us the opportunity to brief it
17 because it allowed me to think about it some more, and also
18 to see where it is up to the Judge's discretion what to do
19 about it. What I see here is a situation where I'm not sure
20 how the work order 2 would be a subsequent remedial measure
21 because if, in the opinion of opposing counsel and Nick
22 Seifert and Bloomin' Brands and Outback Steakhouse, that the
23 floor was changed because of soda fountain leak, then that
24 soda fountain leak isn't referenced anywhere in that work
25 order, so then it wouldn't be a subsequent remedial measure.

1 But, nevertheless, we provided our brief to the Court on
2 that issue, and the Court will decide what it wants to do.

3 THE COURT: You can always, if you're going to
4 impeach, reserve the opportunity to recall the witness,
5 because, you know, as I told the jury in the beginning, you
6 put your direct evidence on, they then defend, and then you
7 can come back with any rebuttal and impeachment.

8 In my opinion, that's the way would have been the
9 best to try to do that, because then you would know whether
10 the work order was in or not. One other thing, this is just
11 something that I want to say about the rules. You said a
12 couple of times, and it's in my mind but it wasn't on my
13 typed list, you kept saying, "It's authenticated. It's
14 authenticated." Authentication doesn't make a document
15 admissible.

16 A menu from a restaurant can be authenticated.
17 That doesn't make it relevant, and it doesn't make it
18 admissible. Authenticity is the threshold requirement for
19 any piece of evidence like that. So authenticity is a
20 floor, not a ceiling, and because something is authentic
21 doesn't make it relevant or properly admissible under the
22 rules and the law before the jury.

23 You said that at least two times, and I know once
24 clearly you said in front of the jury, again giving the
25 impression that it's an authentic document.

1 Well, as I say, a menu could be authentic but that
2 doesn't mean it comes into evidence or is relevant. That
3 was another misimpression in front of the jury. You argued
4 with the Court on that. You said it's authentic. Anyway, I
5 have to go back, but I know you said it's authentic at least
6 twice, and I know you said it at least once in front of the
7 jury.

8 MR. HAYSBERT: The last note I had, Your Honor, was
9 again about interrupting the Court and not allowing you to
10 speak, and again I want to apologize for that. I will
11 endeavor to do better, if you allow me to. That's all.
12 Thank you.

13 THE COURT: Anything else, Mr. McGavin, that you
14 want to mention or say?

15 MR. MCGAVIN: Yes, Your Honor. Would the Court
16 permit me to use the document camera, please?

17 THE COURT: Yes. Whatever you do, I'll let
18 Mr. Haysbert respond.

19 MR. MCGAVIN: Thank you. What I'm displaying is
20 plaintiff's final exhibit list filed with the Court on
21 August 2, 2023. P1 is the animation, and it's called Haider
22 demonstrative and images, brain map animation. So we just
23 heard counsel say he never once said this was Haider's
24 demonstrative. Well, of course he did. It's right here on
25 his final pretrial exhibit list of August 2, 2023. That's

1 not just, oh, we never said this was going to be Dr.
2 Haider's. Of course, it is. And what happened is, I'll
3 check the transcript, because I believe it was ordered of
4 Dr. Filler.

5 THE COURT: It was Friday. I recall that. I
6 haven't gone back and read it, but something was by Friday,
7 and it wasn't -- I believe it was the update on Dr. Filler's
8 demonstrative.

9 MR. MCGAVIN: Right. Well, there was an update on
10 Dr. Filler's, but once we got into court, he started saying,
11 well, these are slides in here for photophobia and anger and
12 irritability, and he said, well, those don't apply. We will
13 talk about that with the motion regarding Dr. Filler, of
14 course, on his foundation, but I just want to be clear, we
15 didn't make it up to call this Haider's demonstrative. It's
16 how it's labeled and identified on the final pretrial list
17 of August 2. The other thing, Your Honor, regarding this
18 work order 2, and --

19 THE COURT: This was the one with Mrs. Eleftherion.

20 MR. MCGAVIN: Right. So she was asked about this,
21 and what I've highlighted is the date for it, August 27,
22 2018, which was after the soda failure. So now I'm
23 confronted with impeaching on an irrelevant matter, meaning
24 replacing the floors and the damage from the flood which
25 made the floors buckle. The Court mentioned this, and it

1 wasn't on your list, but I do think it's very significant.

2 THE COURT: What are you reading from? The
3 highlighted portion?

4 MR. MCGAVIN: Would you ask that again? I didn't
5 hear you.

6 THE COURT: Where are you reading from on the
7 document?

8 MR. MCGAVIN: Yes. I'll use my pen. First, here
9 is the date created.

10 THE COURT: Okay.

11 MR. MCGAVIN: Then problem description. "Our
12 floors are so bad people are tripping. There's mold.
13 There's warping." That's the issue they were facing with
14 the water flood, and so it's now created this suggestion
15 that there's this work order that was withheld.

16 By the way, plaintiff states they just got this on
17 August 1. Never produced it to us. It's not relevant to
18 this incident because it's related to the flood. Wasn't
19 exchanged in discovery. This is the point -- overarching
20 point I wanted to make, which the Court pointed out
21 regarding Robinson. I hadn't read his transcript, but I
22 certainly was very surprised to hear the 20-minute estimate.
23 I don't believe he said it. But here, if you recall the
24 testimony when Mr. Haysbert started to use this exhibit, he
25 was talking about tripping, not slipping or falling, but

1 suddenly we have moved to tripping, and I couldn't really
2 figure out where we were going with that because he was
3 trying to conflate tripping with slipping and falling. That
4 is deliberately misleading the jury about why people are
5 talking about tripping. When floors buckle, they get wet,
6 and they buckle up from the water flood, people tripping.

7 THE COURT: You are saying the water is cleaned up
8 but the floor has buckled?

9 MR. MCGAVIN: Right. The wood warps. They are
10 wood floors. They warp and they buckle.

11 THE COURT: I have a question, and I can't remember
12 whether I asked it at the time because we stopped
13 Ms. Eleftherion's testimony. I have a question on why this
14 wasn't produced during discovery.

15 MR. MCGAVIN: We didn't have it, and it's not a
16 work order that was responsive to the request. I'd have to
17 go back and look at the request.

18 THE COURT: I don't know how Mr. Haysbert got it
19 and why he didn't -- why somebody didn't list it on their
20 exhibit list.

21 MR. MCGAVIN: He didn't get it until August 1,
22 2023.

23 THE COURT: August 1, 2023. Where did he get that
24 from?

25 MR. MCGAVIN: He put it in the affidavit or in his

1 response on the subsequent remedial measures.

2 THE COURT: Oh, okay. It's in that.

3 MR. MCGAVIN: It's in ECF 300.

4 THE COURT: I've got it. I was focused right now
5 on this other issue, and it's in the remedial measures
6 portion that has been filed.

7 MR. MCGAVIN: Yes, Your Honor. But my point of it
8 is, now that I've had a chance to reflect on it, what he was
9 trying to do was conflate and mislead Ms. Eleftherion, who
10 she would have said yes to anything. I mean, she was just
11 trying to -- she was not hostile at all. She was completely
12 cooperative.

13 When the term "tripping" was being used, I couldn't
14 at the time understand. But now I understand, because it's
15 a way of misleading the jury to say there is tripping going
16 on, and that was part of the problem existing May 23, 2018.
17 It wasn't.

18 THE COURT: Ms. Eleftherion was a nervous witness,
19 that was clear. She was shaking kind of the whole time.

20 I'll let Mr. Haysbert respond now to the two things
21 that you have shown the Court.

22 MR. MCGAVIN: Thank you, Your Honor.

23 MR. HAYSBERT: Thank you, Your Honor. So with
24 respect to the brain map demonstrative, there were two
25 demonstratives that were included as P1. One demonstrative

1 is this two-page document.

2 THE COURT: I know that. That's when the animation
3 came up in the August 1st hearing.

4 MR. HAYSBERT: Correct.

5 THE COURT: When you mentioned it, and everybody
6 said, well, I haven't seen any animation. So that was when
7 it came up in the discussion of P1, when you mentioned the
8 animation, and everybody said, well, we haven't seen the
9 animation. That's how it came up. But it was under P1.
10 That's what you've been complaining, that the animation was
11 part of P1.

12 MR. HAYSBERT: Well, it became a part of P1, Your
13 Honor, because we discussed it, and, you know, we have the
14 brain demonstrative, and we say, okay, we will make that
15 part of P1.

16 THE COURT: It was part of P1, and it hadn't been
17 produced. That's how we got into all of the other
18 discussions.

19 MR. HAYSBERT: That's correct, Your Honor. But it
20 was also -- it was something, as I mentioned then, it was
21 based on the brain scans that were created by Dr. Filler.
22 So they weren't Haider's demonstratives. These are Haider's
23 demonstratives. If we are going to get technical, these two
24 pages are hers that she could use during her testimony. But
25 the brain animation is something that both Dr. Haider and

1 Dr. Filler could use as part of their testimony, because
2 they are taking it from two different perspectives.

3 THE COURT: The record is what it is on this.

4 MR. HAYSBERT: Sure.

5 THE COURT: I understood the animation to be part
6 of P1.

7 MR. HAYSBERT: Yes. Understood. But it was --
8 okay. I won't belabor it, but, again, Dr. Filler -- it's
9 Dr. Filler's brain map animation based on the scans. We
10 already have a P2 of all the things.

11 THE COURT: He said that he did not do that. I'm
12 not going to go back over it. Dr. Filler specifically said,
13 "I didn't do that." He said he did not do it when he was
14 asked. "I didn't do that. I have this demonstrative."

15 MR. HAYSBERT: And technically he didn't, but it
16 came from his brain scans. So he said substantive. We
17 won't go over it.

18 The second thing that defense counsel brought up
19 was the work order 2, and that's something that I will
20 appreciate hearing more from the Court about because I don't
21 understand why it wasn't provided to us in discovery. It
22 was responsive to the same question that was asked.

23 THE COURT: Where did you get it from?

24 MR. HAYSBERT: I got it from Service Channel.

25 THE COURT: Who?

1 MR. HAYSBERT: Service Channel, the third party
2 that handles all the work orders. We received it from
3 Service Channel.

4 THE COURT: Service Channel?

5 MR. HAYSBERT: Service Channel. That's the name of
6 the company.

7 THE COURT: So the risk management?

8 MR. HAYSBERT: No. This is a third-party company.

9 THE COURT: I have never heard of Service Channel
10 so I don't know. That's never been part of anything that's
11 been presented to the Court. It's not in. We will
12 determine whether it comes in and the circumstances of it,
13 if appropriate.

14 MR. HAYSBERT: Sure. That's something I wanted to
15 just bring to the attention of the Court that it should have
16 been produced in discovery. Now that we have it, it's
17 responsive to the same discovery request that we provided
18 the Court before, our request for production of documents
19 number 24, and Outback Steakhouse's part of P set 2. The
20 same information was also requested in our initial round of
21 discovery in August of 2020.

22 THE COURT: All the discovery issues have been
23 resolved, and we're not going to go back through discovery.
24 We can go through how you got it, if appropriate. Nobody
25 said there is a violation. It hadn't been brought to the

1 Court's attention. I don't know anything about this
2 document until we get to the remedial measures.

3 MR. HAYSBERT: We can bring it to the Court's
4 attention because it was not provided, and that violated the
5 Court order when it wasn't done.

6 THE COURT: There is no motion in front of me. I
7 am not going off now on a tangent about a document in
8 discovery because all the discovery issues have been
9 resolved. That doesn't mean that you can't use it. I
10 haven't ruled on that. But we are not going off onto a
11 discovery tangent now because we're here at trial.

12 All I was saying is it wasn't listed, and then now
13 they are saying you got it August 1, and I haven't heard of
14 the place you got it, but if we can establish how it was at
15 the appropriate time, we will do it, but not in the middle
16 of this matter. I'm not paying any attention to that on
17 this matter.

18 MR. HAYSBERT: Understood, Your Honor.

19 THE COURT: As far as I'm concerned, it's part of
20 the remedial measures issue.

21 MR. HAYSBERT: I'm not exactly sure why it was
22 brought up, but I wanted to respond to it. Thank you.

23 THE COURT: You've responded, and I'm frankly not
24 considering that evidence on the current motion. It will be
25 considered on the remedial measures, if appropriate.

1 Counsel, the next matter that we are going to take
2 up is the motion for a mistrial that's pending before the
3 Court. It's 10 minutes to 3:00. We will reconvene at 3:30.
4 So if you all need to eat lunch or whatever, you can do that
5 now, and we are going to reconvene and take up the next
6 motion, which is the motion for a mistrial.

7 Court stands in recess until 3:30.

8 (Luncheon recess from 2:48 p.m. to 3:32 p.m.)

9 THE COURT: Mr. McGavin, we are now on your motion
10 for a mistrial. You can go forward with any argument.

11 MR. MCGAVIN: Thank you, Your Honor. Your Honor,
12 on behalf of the defendants, we made an oral motion for a
13 mistrial when Mr. Haysbert was pursuing the line of
14 questioning for which he knew inevitably required responses
15 related to insurance. The reason we know that is due to the
16 expensive discovery record in this case whereby plaintiff
17 sought the deposition of Tristal Hall. Ms. Hall was the
18 risk management person. At the time it was Gallagher
19 Bassett, who is the third-party administrator for the
20 insurance company and for the self-insured retention that
21 Outback has.

22 We also know that on or about May 25, 2018, two
23 days post-incident, Ms. Hall contacted the guest, who didn't
24 want to talk, she was in pain and sleeping, gave her my
25 info, and asked her to call back. We also know that

1 Mr. Haysbert --

2 THE COURT: I thought the testimony was that there
3 was never any call back.

4 MR. MCGAVIN: That's incorrect. There is a record
5 of it.

6 THE COURT: That's okay. Maybe I misheard the
7 testimony, but I thought the testimony was maybe it was that
8 neither one of the people at the store called back.

9 MR. MCGAVIN: That's the point.

10 THE COURT: Again, that implies that there was no
11 callback, but there was a callback.

12 MR. MCGAVIN: Yes. It was a callback from the
13 insurance, and what the point that was so misleading about
14 it is Mr. Haysbert was trying to imply that, well, Lisa
15 Crosby didn't call back and Chip Chase didn't call back.
16 That's why. This goes to Tampa, where the risk management
17 team gets assigned all claims, and then they reach out,
18 prepare a file, investigate, and then, in most cases, they
19 get resolved. That's the insurance side of it.

20 THE COURT: Was all that on the record, that it
21 went to insurance, and there was a call back to the
22 plaintiff?

23 MR. MCGAVIN: I don't know if that record of the
24 call back is reflected in the depositions. They are so
25 long, Your Honor. Lisa Crosby was seven hours.

1 THE COURT: You said there was an e-mail of some
2 sort?

3 MR. MCGAVIN: Yes. There is a record in the
4 Gallagher Bassett record, which I could show you.

5 THE COURT: That's okay. Mr. Haysbert will offer
6 some explanation, I'm sure.

7 MR. MCGAVIN: Well, the point is that to suggest
8 that Lisa Crosby was going to call back, or Chip Chase was
9 going to call back, that's not how it works, and so what
10 happened is we have this discovery battle over whether
11 Tristal Hall was going to have to produce her claims file,
12 which is something Mr. Haysbert asked for. We objected.
13 Judge Miller determined it didn't have to be disclosed.
14 Then there was a request to take her deposition, which we
15 objected to, and Judge Miller dealt with that, too. I don't
16 want to get too far.

17 THE COURT: That's okay because the Court at this
18 juncture doesn't want to go back through discovery rulings.
19 You go ahead.

20 MR. MCGAVIN: Nor do I, Your Honor. But it's
21 important to understand.

22 THE COURT: It was deliberate.

23 MR. MCGAVIN: Yes. That there was a clear
24 understanding that there was insurance involved.
25 Mr. Haysbert noted his representation on June 22, 2018,

1 issued a spoliation letter, and then there was the motion
2 for spoliation regarding the video. We had -- we went round
3 and round and round on all that. There was no video, so.

4 But, in any event, I bring that up because there
5 would be no reason to be exploring with these witnesses,
6 once you submit the incident report, who is going to call
7 back. And what's the process? Because the answer
8 inevitably is risk management. What we heard from the
9 witnesses that were asked that question is, risk management.

10 THE COURT: Or insurance.

11 MR. MCGAVIN: Or directly insurance. They're the
12 same thing. So when it first came up, I objected on the
13 grounds of relevance. I couldn't say more, obviously,
14 without injecting that issue. This wasn't just inadvertent.

15 THE COURT: I've got the transcript here. That was
16 proper timely objection. You objected to, I think,
17 "ensure."

18 MR. MCGAVIN: Yes.

19 THE COURT: It was sustained. At some point
20 Mr. Haysbert said, "I'll never use the word 'ensure' again,"
21 or something like that, but then when the word "insurance"
22 was mentioned, you objected.

23 MR. MCGAVIN: I did, because the point on the
24 "ensure" was it is not standard for a property owner to an
25 invitee. It's reasonable care. It's not -- they're not

1 ensuring that no one could ever fall. They can't prevent
2 people from falling. There is many reasons why people fall.
3 They might have a -- may faint or pass out for reasons
4 unknown.

5 So that's why we made the motion for mistrial,
6 reluctantly. A mistrial means we have to come back.

7 THE COURT: They have to first determine they want
8 to.

9 MR. MCGAVIN: That's true.

10 THE COURT: They first have to determine the Court
11 would give them some amount of time whether to notify the
12 Court whether they are seeking a new trial.

13 MR. MCGAVIN: Obviously.

14 THE COURT: If it occurs, I will set the proper
15 parameters that the law requires me to set, the law and the
16 rules.

17 MR. MCGAVIN: Correct. So his question was whose
18 responsibility was it at the time you were the manager of
19 the Outback Steakhouse in Chesapeake to follow up with an
20 injured person who had slipped and fallen? We cite that on
21 brief. That's so obvious. As the Court said at the time,
22 it's insurance and Tort Law 101, and *Hope Windows*, which is
23 the leading case on this issue from 1968, it's still the law
24 in Virginia.

25 So sometimes the courts are inclined to grant a

1 curative instruction, but the way this has been developed, I
2 almost have to say to the jury, because the Court is
3 correct, the plaintiff is trying to create this inference,
4 both with the camera issue and the callback, that somehow we
5 were hiding this, because what he said in opening is, by the
6 way, completely inappropriate, corporate indifference.
7 That's basically failure to accept responsibility and pay us
8 the amount of money we want.

9 That's irrelevant. This is a slip and fall case
10 with disputed liability. So to make that kind of
11 inflammatory argument, and then take down this line of
12 questioning, I almost have to jump up and say, well, wait a
13 minute, the way this works is we have a risk management
14 team. There is an insurance company, a third-party
15 administrator, and so on and so forth. But I don't want to
16 do that. Leave that out.

17 I don't think anybody on this jury is going to
18 assume that Outback Steakhouse, with 500 facilities around
19 the country, is, you know, not viable. It's a huge company.
20 I get that. But why put me in the position of having to:
21 One, object. Now they think I'm hiding something; and,
22 number two, knowingly go down this irrelevant path. It
23 makes no difference whether we call back or we didn't and
24 who called back. The issue is, was the floor slippery,
25 inherently; did we know; or, number two, was there a foreign

1 substance on the floor that we either -- did we know about
2 it and fail to clean, or was it open and obvious, and we
3 didn't need to warn.

4 Then there is issues of contributory negligence and
5 then proximate cause. But whether somebody called back in 1
6 day or 2 or 7 or 12 is completely irrelevant, and there's
7 only one purpose, to create this impression of, quote,
8 corporate indifference and force the defendant to object to
9 exclude it at the risk of injecting insurance in the case.
10 It shouldn't have been done. It's basic, it's basic
11 Virginia law.

12 I don't know what the law is in California. I
13 think they can do all kinds of things over there. It's much
14 broader, I know. But here in Virginia, *Hope Windows* is
15 still a good law. In my view, a curative instruction, based
16 upon this record, I don't know how you fix everything that's
17 been done, that puts the kind of popping up and down like a
18 jack-in-the-box. And even by the end of the second day, as
19 I discussed with my colleague at counsel table, I'm just
20 going to have to just sit here and let this go in hopes that
21 we can finish. Eventually, I guess, that's the strategy.
22 What I mean is not object as much, you kind of have to let
23 things go.

24 THE COURT: That's what I was saying. Ask the
25 repeated questions, asked and answered. If we jumped up to

1 every one of those, or the Court called it down, we would
2 never get through trial.

3 MR. MCGAVIN: You said that to me, Your Honor, at
4 one of my objections, or words to that effect. I was trying
5 to take that to heart, and I understand the issue. So
6 simply stated, it violates longstanding Virginia law.
7 There's no reason -- it wasn't inadvertent, it's the
8 inescapable path that we were on, and the evidence that was
9 being sought regarding the callback is completely
10 irrelevant. Thank you.

11 THE COURT: Well, I want to read into the record
12 here. I know it's in your briefs, but I want to read it
13 directly from the transcript what we are talking about. The
14 first references are on Page 10 and 11. I would start it at
15 line 15. This is with Ms. Eleftherion: "So would part of
16 that overseeing responsibility include following up an
17 injured person who had slipped and fallen on the floors? It
18 was not, no.

19 "Question: I'm sorry?

20 "Answer: No, that was not part of my
21 responsibilities at the time.

22 "Question: Whose responsibility was it at the time
23 that you were the manager of the Outback Steakhouse in
24 Chesapeake to follow up with an injured person who had
25 slipped and fallen?

1 "Correct. If our insurance provider at the time
2 was involved, we had an insurance liaison who would follow
3 with that person."

4 Now, this is after we have gone through the issue
5 of using the word "ensure," and would you make sure or
6 whatever, and Mr. Haysbert says, "I'm never going to say the
7 word "ensure" again."

8 Then Mr. McGavin objects immediately, and the Court
9 sustained.

10 "Mr. Haysbert: It's only been said. I don't have
11 a question pending.

12 "The Court: Insurance is not an issue at all in
13 this case."

14 Then Mr. Haysbert follows up with question to the
15 witness: "So I'm only asking you what you would do in your
16 personal knowledge. Okay. So let's leave insurance out of
17 it. And although insurance is within your personal
18 knowledge, we are leaving insurance out of it." Three
19 times. And you say, "It's within your personal knowledge,
20 we are leaving that out."

21 Now, that alone, in my mind, could cause a mistrial
22 because you use "insurance" three times in one question, and
23 implied that she knew about it, but we are going to leave
24 that out. But it keeps on.

25 "The Court: Mr. Haysbert, please follow the

1 Court's rulings.

2 "Mr. Haysbert: Yes, ma'am.

3 "Mr. McGavin, Your Honor, I have a motion.

4 "The Court: Let's do things this way." He
5 objected, and then we went on with this, and then he had a
6 motion, all in the same sequence. I'm going from Page 10 to
7 Page 11:

8 I'll go back.

9 "The Court: Mr. Haysbert, please follow the
10 Court's rulings.

11 "Mr. Haysbert: Yes, ma'am.

12 "Mr. McGavin: Your Honor, I have a motion."

13 And I said, "Well, let's do things this way. I
14 think it's a good time for the jury to take a luncheon
15 recess, because it is after 1:00 now, and I think lunch is
16 being bought in for you. So we will be in luncheon recess
17 until 2:00, and I would ask that you, Ms. -- how do you say
18 your last name?" And she said, "Eleftherion." And I then
19 instructed her she was in the middle of her testimony, and
20 so forth. That's on Pages 10 and 11.

21 So we come back. Now, this is on Page 36. This is
22 really disturbing to the Court because you were asking the
23 same question. It's now, no, I was asking about Outback
24 Steakhouse or something like that. Well, you asked about
25 Chesapeake Outback Steakhouse in both of those questions.

1 But you come back, and now I'm on Page 36, line 13:

2 "Okay. If a person was injured in the dining room
3 through a slip and fall, whose responsibility was it to
4 follow up with that person at Chesapeake Outback Steakhouse,
5 at the Chesapeake Outback Steakhouse, if anyone?

6 "Mr. McGavin: Objection, Your Honor. Object to
7 the form, relevance.

8 "The Court: Let's see. I hope this doesn't go
9 astray.

10 "Mr. Haysbert to the Court: It won't. I promise
11 you.

12 "The witness: There is protocol to follow, any
13 type of incident, whether it's a slip and fall or different
14 incident regarding to a guest or somebody who works there,
15 we have to call in our insurance group." It's basically the
16 same question, just re-arranged in a few words, and the
17 Court caught it and warned you about it.

18 Then when you came out with the answer, there was
19 an objection. I said to Mr. Haysbert, "You've asked that
20 question before, and that's the answer you got. There has
21 been an objection to it, and the Court specifically said
22 there is no insurance in this case. There should be no
23 mention of it and no insurance issue. That's the question
24 you asked before that got the same answer.

25 "Mr. Haysbert: I said at the Chesapeake Outback

1 Steakhouse, is what I said.

2 "The Court: Whatever. It elicited it. It is
3 along the same lines, and it has now elicited the same
4 response.

5 "Mr. McGavin: Your Honor, I renew the motion I
6 previously made.

7 "The Court: I completely strike that question and
8 that answer at this juncture because it's not part of the
9 case. It's improper under the law for it to even be
10 mentioned. I thought you heard that, too, but you didn't,
11 as the witness, hear that?"

12 The witness says: "Yes, ma'am, I heard it.

13 "Mr. Haysbert: If I move on. Thank you, Your
14 Honor. Thank you, Ms. Eleftherion."

15 She's a witness. She heard it, but then you asked
16 the question, and she's nervous as she can be, and she's
17 under oath. She answered it the same way.

18 So it is of great concern to the Court that early
19 on, Pages 10, 11 we had this. We took a break. The Court
20 made rulings. The Court did the best it could to keep it as
21 low key in front of the jury, and then you come right back
22 with basically the same question, and I warned you, and it
23 got the same answer.

24 Then on top of that, Mr. McGavin now says you knew
25 all of this. So you explain to the Court how this wasn't

1 deliberate. Then before that, you had gone through all of
2 this. "Do you make sure? Do your ensure?" That was the
3 whole colloquy before that was objected to, and then that's
4 when you said, "I'll never say that word again." But then
5 you asked questions that obviously elicited insurance.

6 So that's what's at issue in regard to this
7 witness. It was also elicited risk management from
8 Mr. Chase. I've checked his transcript, and it was. But in
9 any event, so it was asked even again the same thing where
10 you knew it was going to be risk management with Mr. Chase.
11 So please explain it now, Mr. Haysbert.

12 MR. HAYSBERT: First, I would like to say, Your
13 Honor, Tristal Spanola works for Bloomin' Brands, not for a
14 risk management. So we don't know any connection that we
15 are aware of.

16 THE COURT: What are you saying?

17 MR. HAYSBERT: Tristal Spanola. He mentioned
18 Tristal Spanola again.

19 THE COURT: Well, they are both defendants in the
20 case, and we've gone through that.

21 MR. HAYSBERT: She has nothing to do with
22 insurance, is what I'm saying. We didn't know she had any
23 connection to any sort of insurance. So Tristal Spanola,
24 from what we know of, was a Bloomin' Brands' employee.

25 Secondly, the proper order of events, in terms of

1 representations regarding getting back with -- because
2 that's where the whole context of this whole line of
3 questioning came from, is that Chip Chase provided his card
4 to Dr. Haysbert's daughter. Lisa Crosby provided her --

5 THE COURT: Chip Chase? I thought it was through
6 Robinson that wrote down the number.

7 MR. HAYSBERT: I'm sorry. Lisa Crosby provided
8 Chip Chase's card to Dr. Haysbert's daughter.

9 THE COURT: I don't believe he was even there.

10 MR. HAYSBERT: He was there in the kitchen.

11 THE COURT: He wasn't out in the area.

12 MR. HAYSBERT: Correct. I'm sorry. Lisa Crosby
13 provided Chip Chase's card to Dr. Haysbert's daughter, and
14 then also Lisa Crosby provided her own number to
15 Dr. Haysbert's daughter. The testimony was that he provided
16 the numbers, called those numbers, and nobody ever got back
17 to us. So then my follow-up, the reason we got into this
18 context was, well, whose responsibility is it within the
19 Outback Steakhouse itself to follow up with customers? The
20 reason I asked this question is because it was elicited in
21 deposition about the managing partner of the restaurant is
22 the one who ultimately is supposed to follow up.

23 Ms. Eleftherion said in her deposition that
24 ultimately, because I wasn't the managing partner, that was
25 Chip Chase's role. Lisa Crosby also said in her testimony,

1 if she is allowed to testify, that it was also Mr. Chase's
2 role.

3 So what I'm eliciting from two individuals that
4 worked there that were key managers, critical managers, was
5 that there was no personal responsibility that they were
6 giving themselves to follow up with anyone. In Lisa
7 Crosby's situation, she gave her number to Mrs. Haysbert and
8 said if you ever need anything, get back to me.

9 According to Ms. Eleftherion's testimony, she is
10 the guest relations person, the guest advocate. If anyone
11 should be in a position to do that, it would be Lisa Crosby.
12 So why isn't anyone following up with Mrs. Haysbert? Why
13 isn't anyone taking any personal responsibility for what
14 happened at this restaurant? Why are we talking about
15 anything else outside of that? I have no idea. I didn't
16 deliberately elicit testimony to talk about insurance, not
17 at all.

18 THE COURT: Why did you ask the second question the
19 same way, just tweaking it a little it?

20 MR. HAYSBERT: You instructed her not to talk about
21 insurance.

22 THE COURT: Well, then why did you ask the
23 question? I cautioned you on that question. I cautioned
24 you on that question, Mr. Haysbert.

25 MR. HAYSBERT: You also cautioned the witness, Your

1 Honor.

2 THE COURT: I cautioned you on that question, and
3 it elicited the same answer. I'm not going to keep bringing
4 up the word. It wasn't necessary, because I had already
5 done what I should do, and then I cautioned you on the
6 question, and you went right ahead with it.

7 MR. HAYSBERT: Your Honor, you did caution me on
8 the line of questioning.

9 THE COURT: On Page 36.

10 MR. HAYSBERT: Understood. And, Your Honor, I
11 wasn't trying to deliberately bring in the response again.
12 In fact, I heard her -- I heard you provide her the similar
13 instruction, "We are not talking about insurance," and so
14 I'm expecting -- my question, which could have been worded
15 better, I would give you that, I could have said, you know,
16 "Within the four corners of the Outback Steakhouse itself,
17 who is the person that's responsible for making sure that
18 any follow up that goes to an individual that's been through
19 something, that person within that restaurant follows up
20 with that person? I could have said it more articulately,
21 but I wasn't deliberately trying to elicit an answer
22 regarding insurance. That isn't what I was doing. If you
23 had given her the instruction, that you're not supposed to
24 talk about insurance. I'm not trying to blame her. I know
25 that she was nervous. Every witness here, you know, most

1 people haven't been here before, and I was being as nice as
2 I could to Ms. Eleftherion. I was treating her very
3 respectfully, but I wasn't trying to get her to say anything
4 about insurance. That's my answer.

5 THE COURT: Any response, Mr. McGavin?

6 MR. MCGAVIN: You know, attachments to our motion,
7 Your Honor, we include Page 315 of the deposition of
8 Ms. Eleftherion.

9 THE COURT: You either put it up, or I can get to
10 it. I've got it here.

11 MR. MCGAVIN: I'll put it up, with the Court's
12 permission.

13 THE COURT: You have my permission.

14 MR. MCGAVIN: Thank you.

15 THE COURT: It's part of your motion, but I've got
16 a lot of depositions here.

17 MR. MCGAVIN: I know, Your Honor. So I highlighted
18 in yellow, and we are talking about the incident report in
19 this section beginning Page 315 at line 5.

20 "At what point in time could it have come across in
21 an e-mail?"

22 "Answer: I honestly don't remember. I am thinking
23 that when we initially called the incident in to our
24 insurance, that they had requested anything that we had, and
25 I, again -- I don't remember very well, but I think we

1 had -- I think we had sent it to them."

2 So he says, well, what do you mean? Well, I'm not
3 quoting he says:

4 "We sent it to them?" question.

5 "Answer: The restaurant. I did not personally
6 send it." So now you can see we are talking about the
7 incident report. So where does the incident report go?
8 It's sent into our insurance.

9 So this is Ms. Eleftherion testifying about what
10 happens when an incident report is prepared. It's required
11 to be prepared on the day of -- the next day of the event,
12 and it's sent to whom? And Ms. Eleftherion's understanding,
13 and mine as well, it's going to the risk
14 management/insurance department.

15 So what apparently Mr. Haysbert is trying to do is
16 try to argue the risk management department at Bloomin'
17 Brands, who is self-insured at some level, is not insurance.
18 Of course, it is. They're self-insured up to a certain
19 level. Then they have excess upon excess upon excess. Of
20 course, it is their insurance department. That's where the
21 incident report goes. There is no debate about that. And
22 in the world of a key manager at Outback, they sent it to
23 insurance. That's who handles it. That's who resolves
24 these cases. So to try to slice the onion so carefully when
25 we have it right here, when he asked where does the incident

1 report go? We send it to our insurance.

2 THE COURT: I know it's in the record because I've
3 looked at it. You attached all those depositions. But can
4 you just go to the front and tell the Court the date of the
5 deposition?

6 MR. MCGAVIN: Yes, I can, Your Honor. We have it
7 here.

8 THE COURT: It is here. I have them all
9 paper-clipped.

10 MR. MCGAVIN: I understand, Your Honor. This is
11 the remote videotaped deposition of Alicia Louise
12 Eleftherion, May 13th, 2021. Believe me, this is fully
13 explored because here we have Ms. Eleftherion with a
14 deposition that's 331 pages. It concluded at 5:15 p.m. It
15 commenced at 8:22 a.m. So that's all in, and we kept
16 careful notes. It was a full seven-hour deposition, and
17 Mr. Haysbert certainly had every opportunity to ask
18 repetitive questions, which he did, and I objected
19 repeatedly, asked and answered. He had a full record,
20 nothing withheld. So he knew. It's evident right here.

21 Thank you, Your Honor.

22 MR. HAYSBERT: Your Honor, if I may. The
23 deposition testimony that he just provided to you was in the
24 context of discussing an incident report. That was not an
25 exhibit in this case, was never discussed at trial, and

1 never came up. I made no reference in the incident report
2 here. In fact, my entire line of questioning at the time
3 this came up had to do with safety at the Outback and
4 accountability by managers. That was all. So this wasn't
5 deliberate.

6 You cured it with a curative instruction. You
7 provided the information to everyone that they needed to
8 know to protect the record, and that's where we stand.
9 Everyone saw the witness was nervous, including the jury.
10 They knew that she -- she is a nervous person, or she was
11 nervous on the stand. I think anyone would recognize that,
12 and maybe she would say something that, you know, she
13 misheard or she heard the judge to tell her to do something
14 that she didn't do, and I think that that was adequately
15 protected by your curative instruction, Your Honor. I truly
16 do believe that. I don't believe that this -- and this is
17 my personal opinion -- that something the jury gave much
18 thought to, especially after you provided that instruction.
19 But I can tell you where I stand, and that is there was no
20 deliberation on my part to focus on insurance or to try and
21 get insurance involved in this.

22 In the context of that deposition, that was an
23 incident report that I was referring to. That's the only
24 reason it came up, because she was saying incident reports
25 have to be sent into the insurance company. But there is no

1 incident report in this case. It wasn't on the exhibit
2 list, and I planned to make no reference to it, never made
3 any reference to it. I simply wanted to know who at the
4 Outback holds them personally accountable to customers when
5 you tell them you are going to follow up with them, you
6 actually do it.

7 MR. MCGAVIN: Your Honor, may I respond very
8 briefly?

9 THE COURT: Yes.

10 MR. MCGAVIN: Thank you. There was an incident
11 report, and Mr. Haysbert knows it, and he filed a motion to
12 compel production of it. We withheld it because it was sent
13 to the insurance company as part of the claims process, and,
14 therefore, it was not produced. So he knows.

15 THE COURT: It was ruled on in discovery.

16 MR. MCGAVIN: Yes. So he knows that. He sought
17 it. He wanted it. Judge Miller refused to allow it because
18 it was prepared in anticipation of litigation. So for him
19 to stand here and say there was no incident report on the
20 witness list, obviously, because it injects insurance into
21 the case, and he's created the record here in this case,
22 through Mr. Chase, that an incident report has to be
23 prepared, and anybody who's a key manager can fill it out,
24 and it was done. So to represent to the Court there was no
25 incident report in this case, that's just false.

1 THE COURT: Well, if you would have tried to
2 introduce it at trial after the ruling of Judge Miller and
3 any appeal to the District Judge, it would have been, again,
4 a violation of the rules.

5 MR. MCGAVIN: Yes.

6 THE COURT: A violation of the Court's orders.

7 MR. MCGAVIN: I'm reminded by Ms. Blake, who's
8 asked me for you to consider this, at Page 2 of our brief,
9 we are citing Mr. Chase's testimony.

10 THE COURT: Let me go to Page 2 of your brief.
11 It's right here.

12 MR. MCGAVIN: I had forgotten this, Your Honor,
13 honestly.

14 Thank you, Ms. Blake.

15 THE COURT: I had mentioned Mr. Chase, too, that it
16 came up yet again during Mr. Chase. But let me get this
17 paper clip off of here. Go ahead. I'm on your trial brief.
18 There are so many pieces of paper here. I'm sorry. I'm on
19 your trial brief as defendant's motion for mistrial, ECF
20 Number 298, and I believe that Mr. Chase's deposition
21 testimony from May 12th, 2021, is set forth in the middle of
22 the page.

23 MR. MCGAVIN: Yes. And specifically Mr. Haysbert
24 asked: "Did you respond to the other possibly two slip and
25 fall incidents that occurred at the restaurant?"

1 "Respond to the guest directly, no.

2 "Why not?

3 "Because once it's filed through the system,
4 normally it's taken care of through the claims.

5 "When you say it's normally taken care of through
6 the claims, what are you referring to?

7 "I mean any information, or if something is, you
8 know, wrong, more than what the guest says, you know,
9 follow-up, make sure that the guest is okay, and that's done
10 through the claim."

11 Claim is insurance.

12 "When you say following up to make sure the guest
13 is okay is done through the claim, what are you referring
14 to?

15 "I mean if a guest falls, and they say they're
16 perfectly fine, you know, there's no issues, there's a claim
17 filed anyway just to make sure that everything is okay."

18 And we have a similar reference, I believe, in Lisa
19 Crosby's deposition that we cited, but there is no -- this
20 is so obvious for a company of the size of this that has its
21 own self-insurance, 500 facilities, they have a claim, they
22 take it right on up, and there is an insurance process,
23 there is an entire team.

24 This is fully explored, and we are dancing on the
25 head of a pin here to try to say, oh, gee, I never really

1 would have thought they would talk about insurance. To the
2 extent, by the way, that Mr. Haysbert thinks that's
3 important that Mr. Chase or Lisa Crosby had an obligation to
4 follow up, actually, they didn't. It was up to claims to
5 get back with the person who makes a claim, and that's what
6 that is. So there is no good explanation to say I didn't
7 know or didn't expect it.

8 THE COURT: Mr. Haysbert.

9 MR. HAYSBERT: Yes, Your Honor. So contrary to
10 what Mr. McGavin has represented to the Court, the incident
11 report was provided to me, and if you look back at the
12 deposition testimony that he provided, you will clearly see
13 that the document that I put on the Elmo, we did it
14 remotely, put on the computer screen was the incident
15 report, and we were talking about that with respect to
16 Alicia Eleftherion.

17 So the incident report was provided. It was
18 deliberately left off the exhibit list, never came in, never
19 became an issue. It had to do with insurance, and we were
20 not trying to touch it.

21 With respect to Chip Chase and Alicia Eleftherion,
22 these are two key managers at the facility that were there
23 on the day of the accident. When you are down near the
24 accident, and you give the person who has been involved in
25 the accident your card, and someone tells them, here is my

1 number, from the location, then you would expect some type
2 of follow-up, especially them reaching out to you.
3 Testimony was elicited that they called the numbers that
4 they were provided. No one ever responded to them.

5 The other part of what I was trying to elicit from
6 Alicia Eleftherion is when you were responsible for
7 everything that happened in the front of the house, is it
8 your responsibility to follow up with the person? If it's
9 not yours, who working at the Outback, either at the time
10 the incident happened or overall, has to follow up with the
11 individual who went through the slip and fall? And it was
12 never meant to deliberately elicit any sort of information
13 regarding insurance. Never asked those specific questions
14 at deposition, never intended for it to go to insurance at
15 all. Thank you, Your Honor.

16 THE COURT: Is there anything anyone wants to say
17 any further on the mistrial or the reasons for the
18 revocation of Mr. Haysbert before I make my rulings?

19 MR. MCGAVIN: Just very briefly, Your Honor. I
20 would say this is not an isolated incident in the conduct of
21 this trial, and the totality of the circumstances require
22 that not only the plaintiff get a fair trial but the defense
23 as well. Just in two days of testimony to have this many
24 issues arise, we believe, will deprive the defense an
25 opportunity to have a fair trial.

1 It's not just the insurance, but when you consider
2 the rare, if ever, motion to revoke a *pro hac*, I've never
3 made such a motion, but I feel it's appropriate, and when
4 you consider the entire circumstances, this trial is tainted
5 by the conduct of Mr. Haysbert, and he should be precluded
6 from this case or, frankly, any other in the Eastern
7 District. Thank you.

8 THE COURT: I will begin my ruling on declaring the
9 mistrial in the case. I would start with the case from the
10 Fourth Circuit that was actually cited by the plaintiff in
11 it's brief, ECF Number 296 at 5-6, when the Court is
12 determining whether an error in a case can be cured by a
13 cautionary instruction, it is within the discretion of the
14 trial court, "Because the Trial Judge can best evaluate the
15 atmosphere of the trial and the possibility of prejudice."
16 That is the case of *Riddle versus Exxon Transportation*
17 *Company*. It's a Fourth Circuit case, 1977. It's 563 F.2d
18 1103, and that is a standard whereby the Trial Judge is in
19 the best position to assess the overall atmosphere and the
20 possibility of prejudice, and that if an error can be cured
21 by a cautionary instruction. I will be addressing those
22 matters in my ruling.

23 When it comes to a trial court's discretion to
24 declare or decline to declare a mistrial, "The exercise of
25 such discretion will not ordinarily be disturbed unless

1 clearly erroneous." That's from *Bright v. Coastal Lumber*
2 *Company*, 962 F.2d at 365 at 370, and it's a 1992 Fourth
3 Circuit case.

4 There are some internal citations, quotation marks
5 there. I'm not going to go through. I'm just going through
6 some legal standards now. In Virginia, "A Court is required
7 to grant a new trial, if requested, when the prejudicial
8 effect of an improper remark or question is overwhelming,
9 such that it cannot be cured by a cautionary instruction."
10 That is *Lowe v. Cunningham*, 268 Virginia at 268, 273. It's
11 a 2004 Virginia Supreme Court case, and the explanation by
12 the Court that is, they have some internal citations, that
13 is because, "A mistrial should be ordered when there has
14 been interference with a fair trial." That's concerned
15 under Virginia law as well as federal law that there be a
16 fair trial. The quote there was from *Riner v. Commonwealth*,
17 268 Va. 296 at 315/'16, 2004 case.

18 Moreover, as the defendants cite, "The rule in
19 Virginia is that in an action to recover damages for
20 personal injuries, the admission of evidence or argument of
21 counsel deliberately injected into a case to inform the jury
22 that a defendant is insured against the accident is
23 reversible error."

24 That's cited in their brief at 298 at 1, and it's
25 quoting the seminal case, *Hope Windows, Inc., v. Snyder*, 208

1 Va. 489 at 493. It's a 1968 case. So those are some basic
2 legal standards.

3 The Court also understands that granting a mistrial
4 is an extreme measure. The Court also understands that
5 revoking a *pro hac vice* application is an extreme measure.

6 As an aside, I will say, to my memory, I have never
7 declared a mistrial in a civil case, as I recall. I do
8 recall two criminal cases in which I granted a mistrial
9 because the prosecutor either failed to disclose evidence
10 that should have been disclosed in discovery under the law
11 and/or made an improper or inflammatory remark in statements
12 or arguments before the jury or in questioning a witness.

13 So I do recall, in my soon to be almost four
14 decades on the bench, having granted two criminal mistrials,
15 and I don't recall any civil. But it's been a long time,
16 and it's not something that the Court takes light and
17 understands the severity and the seriousness of it.

18 The Court also understands the importance of the
19 Court's role to enforce the rules of procedure and evidence,
20 and to ensure that there is a fair trial for both sides. I
21 cannot remember revoking a *pro hac vice* status because I
22 have never had a *pro hac vice* attorney step over the line
23 the way that the Court feels that Mr. Haysbert has with
24 repeated warnings, repeated admonitions.

25 I would say that in all of my years, I don't ever

1 recall this kind of extraordinary leeway being given by the
2 Court as it has in this case regarding the last-minute
3 nature of so many matters and the failure to follow the
4 rules, which I'm going to go through or have gone through in
5 many instances and the reasons that I will also revoke his
6 *pro hac vice* status because many of the reasons that support
7 the revocation of Mr. Haysbert's *pro hac vice* status also
8 support declaring a mistrial. They are in many ways
9 intertwined.

10 I will address the insurance issue, but I'll also
11 address how all of this is intertwined because you have to
12 look at attorney conduct. You have to look at the overall
13 proceeding. You have to look at the atmosphere of trial,
14 and, frankly, I agree at this point this case has just been
15 infected with problems the entire trial, and it does thwart
16 fairness. It thwarts fairness for all parties.

17 The Court would not be doing its duty to leave
18 Mr. Haysbert in this case under the conditions that have
19 occurred and that is not fair to plaintiff and what he has
20 done, and what has been injected into the case is not fair
21 to the defendant. Again, I'm going to go through all of
22 those matters.

23 The bottom line on this is the Court has lost trust
24 in Mr. Haysbert's representations to the Court and the
25 pattern that has occurred. I'm going to go through all of

1 that. There is just a pattern here of rules violations,
2 example, the subpoenas, example repeated asked and answered
3 questions, having to explain adverse witness rules, the
4 problems with Dr. Filler and the animations, the deposition
5 explanations that have had to be made, the talking over the
6 Court, talking over witnesses, and particularly these
7 outbursts that have occurred.

8 One thing I didn't say earlier, but I'll say
9 tonight. It was noted on the record, United States Marshal
10 was in here on Friday night because it was way after hours,
11 and, frankly, they had become aware, there is a court
12 security officer in here, there are people observing in
13 here, and the marshal had become aware of the situation.

14 So that is how strong the outbursts, particularly
15 the first one, were viewed, because this Court is not used
16 to such outbursts from practitioners, and particularly in
17 front of a jury. It is bad enough in front of the Court but
18 not in front of the jury. So I would just make that as an
19 aside. It was noted on the record that the marshal was
20 sitting right at the back of the courtroom and stayed with
21 the proceeding until it was over and made sure that the
22 judge and the court personnel were out of the courthouse
23 safely. So I would just mention that as an aside to the
24 seriousness of what occurred with the outburst.

25 It's not only the Court losing, I meant to say

1 trust in his representations to the Court and to the jury,
2 because much of this has been represented to the jury in
3 this case. So that concerns the Court in both of those
4 regards.

5 I think I mentioned the adverse witness rules and
6 the deposition rules and the animation, which we've already
7 discussed. So I want to indicate that many of the reasons
8 that support the revocation, and I'm going to go through
9 those, of Mr. Haysbert's *pro hac vice* status with the Court
10 also support declaring a mistrial. These include
11 Mr. Haysbert's failure to follow the rules and the rulings
12 of the Court, his misconduct in front of the jury, including
13 at least two outbursts, his intentional line of questioning
14 that injected insurance into the case, his backdoor attempts
15 to introduce evidence that was not yet admitted or ruled on,
16 and his blatant mischaracterization of witness's testimony,
17 when he would re-ask a question, all of which has no doubt
18 had a prejudicial effect on the jury in this case, in my
19 opinion. Those things are just incapable of a curative
20 instruction. I would agree that one mention of insurance
21 can be handled by a curative instruction. But what concerns
22 the Court here on the mention of insurance, first of all, it
23 was clear from Judge Miller's rulings, at some point Judge
24 Krask took over the case, as the Court said last week, the
25 first encounter it had had with the attorneys was at the

1 conference it called, and then I called that conference to
2 try to keep everything on line, and I've endeavored to do
3 that, and I'm going to go through those efforts in summary
4 form.

5 When I find out, based upon these depositions that
6 I had been presented and read, and based upon the discovery
7 in this case, the second incident, particularly, was
8 uncalled for. But also the statement that bothered the
9 Court tremendously, and maybe the Court could have done a
10 curative instruction on that, but it bothered the Court
11 particularly when it was mentioned again when the Court
12 rules, Mr. McGavin objects, and it's sustained, and he then
13 starts explaining to the witness that insurance is not an
14 issue in the case, or the Court says that. "Insurance is
15 not an issue in the case." Then Mr. Haysbert couldn't let
16 it go. He had to then mention it three times in his next
17 question, and the last time was particularly harmful, and,
18 in my opinion, deliberate. He says, "So, I'm only asking
19 you about what you would do in your personal knowledge.
20 Okay. So let's leave insurance out of it." You didn't stop
21 there. You then had to say, "And although insurance is
22 within your personal knowledge," you didn't need to say
23 that. That's just telling the jury, the witness, you know
24 about it, you're just not saying it because you can't say
25 it.

1 Then you said, "We are leaving insurance out of
2 it." You mentioned it three times. And when it happened, I
3 was particularly concerned because you made a statement to a
4 witness, and then you are blaming her when she says it
5 again. But you've said to her, "It's within your personal
6 knowledge." And I said, "Please follow the Court's
7 rulings." I warned you then, and you said you would. Then
8 we sent the jury out. We had our discussions.

9 Then you come back after the break on Page 36, and
10 you basically asked the same question, you tweak some words.
11 I read that. Mr. McGavin objects, and I say to you, "I hope
12 this doesn't go astray," and you say, "I promise you, Judge,
13 it won't."

14 So you couldn't just stop. That's what's occurred
15 throughout this trial. Leave it alone. She said it, and I
16 ruled it wasn't an issue in the case, and had you stopped at
17 one, but you had to say it three more times, and you had to
18 say, "It's within your personal knowledge." Then on top of
19 that, you then go back pages later -- this is what 's
20 happening -- you want to get this in, so pages later you go
21 back, you ask basically the same question, and this is the
22 excerpt from the transcript that I read as Court Exhibit 1
23 for this hearing. You interjected again.

24 Then on top of that, Mr. Chase comes in, and first
25 you blurt out that he is an adverse witness after we have

1 been through Ms. Eleftherion, and I told you that is not up
2 to you to declare, you have to approach the Court and get
3 permission. The only thing it does is allow you to
4 cross-examine.

5 You blurted that out after we had gone through it,
6 and then you asked him questions about that you knew would
7 elicit risk management. Frankly, everybody at this point
8 knows that risk management is the insurance division. So I
9 have a hard time not ruling that that questioning along the
10 lines of insurance was not -- I find that it was deliberate.
11 But even if it wasn't, this trial is so infected by other
12 problems and prejudice, and the Court has diligently tried
13 to control this.

14 I've endeavored to do everything I can to keep this
15 trial moving forward. I don't want to declare a mistrial,
16 but this conduct can't be tolerated by the Court. The Court
17 just can't tolerate this conduct from an attorney admitted
18 to the court, much less a *pro hac vice*. That is not a
19 right. It is a permissive admission.

20 I thought we had started off to a pretty solid
21 start on August 1. The Court spent a whole day with
22 counsel, and then much into the night getting out the order
23 the very next day that said where we were. Nobody objected
24 to that order. Nobody called the Court's attention to
25 anything in that order, and that order specifically said

1 this is the final governing document. This is going to
2 govern the trial.

3 Then I tried to get your witnesses here. That's
4 why I didn't quash Mr. Seifert. I wanted you to get your
5 witnesses here. The Court wants the case to go to trial.
6 The problem is, things just kept happening repetitively on
7 the same thing. We have been through them when we were
8 talking about the *pro hac vice*, and I think many of your
9 responses were just simply disingenuous. It's the same
10 thing: "I'm sorry. I thought it was" -- "I didn't realize
11 it was 9:00 a.m. I was confused with Pacific time" -- "oh,
12 I was a law clerk. Oh, no, I really wasn't. It was while I
13 was in law school."

14 Well, all judges, many of us, and I can't right now
15 because of the size of my chambers, but we have interns and
16 externs. There are very specific rules for interns and
17 externs and their access to courts and what they can have.
18 But it was just again that little tweaking. It's not the
19 one thing, it's always the tweaking of the information.
20 Because you were not a law clerk. You were an intern. That
21 was again a tweaking of the information.

22 Of course, I looked at Mr. McKelvey's bio. Of
23 course, I looked at your bio. Of course, I looked at
24 Mr. McGavin's. Of course, I looked at Ms. Blake's. So, you
25 know, it's right in your bio, public bio. I knew from our

1 court records when Mr. McKelvey had been entered. The judge
2 just doesn't sit up here in a vacuum.

3 So, consequently, you keep saying you're trying to
4 do better, but it's like a day late and a dollar short at
5 this point in the trial. In my mind, you have been somewhat
6 disingenuous with the Court, that's as best in some of these
7 representations.

8 In any event, I tried to keep this case moving. I
9 think that one of the final straws here was what I consider
10 the surreptitiousness of these subpoenas. You could have
11 said something to the Court. You could have said, I've now
12 located. When something goes on until 8:00 at night, and
13 somebody doesn't have the documents. Your computer person
14 was running all over the place to get copies. We have to
15 bring in the process server because we really don't know,
16 and the times are changing. The subpoenas are changing.
17 But it's the accumulation. It's the cumulative effect. You
18 can't just keep at it and keep at it. Sometimes it's not
19 just one thing. So even if, and I do find that it was
20 deliberate injection of insurance, but even if it was not a
21 deliberate injection of insurance, there is so much here,
22 and I will keep going through it.

23 The other thing is not only the August 1st
24 conference, but I delayed this trial one whole day, and
25 finally had to dismiss the jury, trying to sort out the

1 last-minute issues. Everything seems to have been last
2 minute in this case when you've known about a trial since
3 March 1, and you don't have subpoenas out. Everything's
4 just been last minute; not having the documents here, and
5 then Federal Expressing them when the receipt says it's
6 going to arrive on the 8th. It's just been last minute
7 everything and an excuse for everything. I simply do not
8 accept all those excuses.

9 Somebody can't have that many excuses for
10 everything. The other thing is, I didn't rule out Dr.
11 Haider, even though you violated the rules there. You
12 hadn't given the proper notice under the rules. It wasn't
13 apparently until Judge Miller said it. Because settlement
14 conferences have not been in front of me. I don't engage in
15 those with attorneys that are going to be coming before me
16 for trial, even in a jury trial. I know some judges do. I
17 do not. Judge Miller says, well, I don't know how you're
18 going to get zoom in front of Judge Smith. I'm
19 paraphrasing. I wasn't there, and I don't know. But from
20 what I've gathered through you all is, you're not going to
21 get zoom next week on a witness, and cited the rule to you.
22 That rule specifically says that testimony, what is it, Rule
23 43? Isn't that the rule number?

24 MR. MCGAVIN: Yes, Your Honor.

25 THE COURT: I think that is the rule number. I

1 know about the rule, and I'm pretty sure it's Rule 43, and
2 it hasn't been changed. The pandemic was an exception. The
3 rule specifically says testimony must be presented live in
4 court, and anything that is presented remotely has to be,
5 and it says, for good cause. I'm not going to go back
6 through that whole ruling. But it also, the case law says
7 it's not because somebody's relative, they've got a
8 caretaking responsibility. But I didn't deny you
9 Dr. Haider. I said we need more information.

10 Frankly, it wasn't clear to me that you ever
11 planned to bring her here. I said I need more information
12 in the affidavit. Are there other people to do the care
13 taking? Was she planning to keep her regular schedule? She
14 didn't have to go through lots of things. She knows whether
15 they made appointments or not. Just ask whoever made your
16 appointments. The things that the Court asked were to be
17 sure that she was coming, and if she wasn't coming, that
18 there was proper cause under the law and the rules.

19 So we start out like that, but I didn't deny it. I
20 let you go forward and try. Then, as it turned out, you are
21 certainly entitled to withdraw your witnesses, but then you
22 came in, and none of the experts were coming but Dr. Filler.
23 So I don't know why, but I can tell you that I was
24 endeavoring to be sure that the rules were being followed,
25 trying to prevent points that could have caused great harm

1 to your case.

2 There was not a legitimate reason given, at least
3 in that, and I won't go back through it in the first
4 affidavit that was filed on Sunday night at 10:00-something,
5 I recall. I'm going from my memory now. I don't have it in
6 front of me. But there was something filed at 10:00, I
7 think 10:05 on Sunday night. That would have been August 6.
8 Then something else filed at 6:00-something in the morning
9 on Monday. I think that was the response to motion to
10 quash. I'm not looking at my docket right now. I just know
11 there were two filings in there. There was the motion to
12 quash, and then there was the response, and in the meantime
13 I believe that the Dr. Haider filing came in Sunday evening.
14 It was either Sunday evening or Monday morning. I'm not
15 sure it would have come in had Judge Miller not said you
16 can't do this.

17 You had not informed the Court when we were in our
18 hearing on August 1, you didn't say anything about any of
19 those people coming in by zoom. You didn't say a word about
20 it to the Court. It is nowhere in that record. So I
21 allowed you Mr. Seifert against the time limits, and then I
22 did not quash -- or tell you you couldn't use Dr. Haider. I
23 just did legal and rule requirements.

24 I don't know how I will do a curative instruction
25 on certain things. A curative instruction at this point on

1 insurance would even draw more attention to it since it's
2 been mentioned so many times. But even if I could do a
3 curative instruction there, I tried during the trial by
4 striking an answer, but how do you cure an instruction to
5 the jury that these other errors have occurred, the subpoena
6 errors, for instance. Juries don't understand these things.
7 Juries don't understand the references that you've made.
8 They just don't understand the procedures. I'm not saying
9 they don't understand the evidence. They do. They
10 understand facts, and they listen well. But they don't
11 understand these procedural errors. Those are very
12 difficult to give a jury the instructions in regard to.

13 The improper impeachment. That would be extremely
14 difficult to explain. That's why I just let it go to the
15 jury. I'm not going to go through all that impeachment, but
16 it just wasn't handled correctly. I said so before. I'm
17 not going to go back through and try to cure that with a
18 jury to say you should do this, you should do that. I just
19 let it go in. It's not any one thing like that. It's the
20 cumulative effect. Also, in front of the witness, in front
21 of the jury, declaring two witnesses adverse after we had
22 gone through all of the rulings with Ms. Eleftherion.

23 I may be repeating myself, but as I said earlier,
24 there are so many things, and I know my law clerk and I have
25 talked about it. There are so many moving parts. One part

1 moves into the other. All of these violations are moving
2 parts that come together and create an overall atmosphere of
3 a trial.

4 As the *Riddle* case says, the trial judge is in the
5 best position to determine, through the overall atmosphere,
6 whether there can be a fair trial. I am truly of the
7 opinion at this juncture, given all that has occurred, there
8 cannot be a fair trial.

9 There were attempts to elicit hearsay and opinions
10 from witnesses after you've been instructed not to do so
11 with earlier witnesses. I found those in the transcript.
12 The constant objections at some point. I basically told
13 Mr. McGavin to stop, and then your objection, I still can't
14 get over compound question. I don't know. Maybe you were
15 trying to signal something to Mrs. Haysbert. It wasn't
16 compound, and it wasn't very important, in the Court's mind.
17 But it wasn't a compound question. You just keep
18 interjecting all of this.

19 The work order on the subsequent remedial measures,
20 which I am not going to directly rule on that today. I'll
21 tell you why, because at the end, it's not the admissibility
22 so much that supports the mistrial, it's plaintiff's
23 counsel, before the jury, kept mentioning the work orders
24 and going through those and trying to get it in when he knew
25 they were objected to.

1 He represented they were being used for permissive
2 purposes, including impeachment, and then he mentioned
3 something about warning, and then he made an attempt to
4 quickly publish one of those work orders to the jury through
5 Mr. Seifert, near minutes after this whole conversation had
6 taken place.

7 The Court instructed the jury that the issue of the
8 floor change, remedial measures was still under advisement.
9 It's, again, this trying to get in the animation, it's
10 trying to get in the work order, and yet you continue to
11 focus on it. You just wouldn't give the Court a chance to
12 rule, you kept focusing on it, and it had not been ruled
13 admissible. Then, this is a quote from the record, you told
14 the jury that the work order was, "An authenticated
15 document." Now, how do you explain in a curative
16 instruction authentication? To a jury that means it's a
17 real document. It's part of this case. They don't
18 understand the rules of authenticity being the floor.
19 Authenticity is the floor. You can't get anything in any
20 record if it's not authenticated. Once it's authenticated,
21 there is so much more that needs to be done, and the Court
22 had ruled that. You would say that in front of the jury.
23 "Well, it's an authenticated record." Well, that's makes
24 the jury think, well, you know, somebody's bias, not letting
25 them get a work order in, and Mr. McGavin is objecting, and

1 it's a threshold requirement. It was just misleading.
2 Again, it's this misleading of the jury. Adverse witness.
3 Deposition impeachment and designations. The work order
4 being authentic. Every opportunity you've got, you slip
5 something like that in. I think I'm on Page 4 or 5 now, and
6 all of the excuses given for the things before, the vast
7 majority I found to be disingenuous, and I'll go through
8 some of that in a minute.

9 Frankly, in my view, and I'm not ruling upon it,
10 and I'll say why and how later, but certainly it's up to the
11 Court to decide whether it's permissive purposes. I truly
12 feel like you were trying to get that in to show negligent
13 conduct, and that you were not really doing impeachment.
14 The testimony that came out, there wasn't anything on the
15 floor to put up a sign. You are talking about when they
16 repaired it, putting up a sign or something. I don't know
17 that you ever showed there was anything on the floor. Your
18 witness, your plaintiff -- and I can understand. She was
19 upset. She was shaken by the fall. She didn't look at her
20 clothes. She didn't look at the floor. Her daughter, the
21 same way. In any event, you kept trying to get these work
22 orders in. The only thing I can think of was to show
23 negligence. But, you know, I'm not ruling on any of that
24 right now. Again, I'll mention it later.

25 You just continued to focus on it by the

1 authenticated document and after the Court had ruled and
2 said we are not doing that right now. This makes testimony
3 confusing and misleading to a jury. I'm just not sure on
4 these things that the jury at this point, I would have to
5 give a litany of limiting instructions, and I just don't
6 think the jury can follow those limiting instructions. Even
7 if they could, the case is infected at this point.

8 A cautionary instruction or a couple of cautionary
9 instructions, this has all happened before a jury over just
10 three days, and all this has been going on. Again, Dr.
11 Filler's testimony, we may or may not get to that, but was
12 there any Rule 26(a) disclosure that he relied on
13 Dr. Haider's clinical evaluation? I couldn't find one.
14 Maybe there was. But I wasn't aware of any 26(a), and that
15 relates to the Court's bigger concern regarding repeated
16 mention during Dr. Filler's testimony of Dr. Haider's
17 evaluation, and then you withdrew her as a witness, and the
18 backdoor attempt to play the brain animation. Those are
19 what is of concern to the Court. That was not created by
20 Dr. Filler, and there had been no foundation for who did it.

21 Now you tell me it was a company and when it was
22 done. It was no foundation to even use that as a
23 demonstrative exhibit. I thought Dr. Haider would establish
24 that, but then she didn't come, and he certainly couldn't
25 establish it because he said he didn't prepare it. Then

1 putting on his demonstrative and quickly going through it
2 with the title still being on there. Then the Court has to
3 go back and try very hard at the inception not to taint the
4 jury to think anything is going on.

5 So, consequently, you knew of the outstanding
6 objections, and that's very concerning. You knew of the
7 objections to the demonstrative exhibit of Dr. Filler, and
8 you knew of the objection to the admissibility of the
9 animation, and with Dr. Filler's objective, I'm the one who
10 said do you have anything with Ms. Haysbert's brain imaging?
11 Then you objected to a question about an MRI, who he's the
12 one set up here explaining to us, the only witness we have,
13 that explained the difference in the three types of MRIs.
14 Then you object to a question because he's asked, which was
15 perfectly appropriate, and it had come out through your own
16 witness, that she had this MRI. You objected to it. It's
17 just been one thing after another. The Court just feels
18 like, you know, it can't control you because you just don't
19 observe the Court's rulings, and you just go right back at
20 it.

21 Then every time the Court would look, which the
22 Court can, to Mr. McKelvey, he didn't know. He didn't
23 participate in examining one witness. When I asked him
24 questions, he didn't know. One time he did say he hadn't
25 really been paying attention. He didn't know. I asked him

1 about the subpoena on Friday. I should be able to turn to
2 local counsel. When I asked him about the subpoena on
3 Friday, well, the first thing he heard of it was, I think he
4 said, about 3:00 this afternoon when we were talking about
5 the subpoenas.

6 It's clear to the Court that he has not been fully
7 involved in this case, and the Court's very disappointed
8 because the Court cannot ignore the reality of the situation
9 that has taken place here in court and the rules that there
10 be local counsel and that the local counsel be prepared to
11 go forward with the case.

12 I guess I would say that overall it's the
13 cumulative conduct under the rules and rulings of the Court
14 that cause the Court to declare a mistrial, which cannot be
15 cured by an instruction to the jury on all the issues
16 involved. Although the parties were aware of the trial date
17 since March 1, 2023, and the Court has made every attempt to
18 keep this properly on track, it has been infected with
19 delay, untimeliness, and the failure to follow the rules and
20 the rulings of the Court, and the Court cannot accept this,
21 and the case simply cannot go forward under those
22 circumstances.

23 Now, the first thing that I would say is the Court
24 will reduce its rulings today to a written opinion. I
25 obviously, with the motion coming on Friday, and everything

1 being filed over the weekend, the Court has endeavored to
2 make this ruling as coherent as I can, but it does reserve
3 the opportunity to reduce today's oral rulings to a writing.

4 Obviously, it had to be made today because we
5 cannot keep a jury here. Consequently, and, again, I would
6 go back to, even if there wasn't grounds for the mistrial
7 just based on the insurance, Mr. Haysbert is being removed
8 from his *pro hac vice* status, and a jury trial here can't go
9 forward fairly because there is not any way for the Court to
10 explain *pro hac vice* status and all of a sudden the one
11 individual who has examined every witness, I think referred
12 to himself in introducing himself, I think, as lead counsel.
13 I know he always says that to the Court.

14 So he then just disappears, there is not any way,
15 and I, frankly, am of the opinion that Mr. McKelvey says he
16 can go forward with this, but it hasn't been demonstrated to
17 the Court that he is able to go forward with this without
18 prejudice to the plaintiff at this juncture.

19 That doesn't mean he can't stay in the case,
20 because as far as the Court is concerned, now whatever delay
21 it is, gives the chance to whoever is trying the case, and
22 if it's Mr. McKelvey, fine, to get it straight, get the
23 witnesses here.

24 There is no excuse if the case goes forward in a
25 new trial not to have witnesses here, not to know how to

1 impeach people with deposition testimony, not to be blurting
2 out adverse witness, not to be trying to get in evidence
3 that's been declared inadmissible, not following the local
4 rules of the Court in regard to zoom and subpoenas going out
5 and all of the matters that have been mentioned.

6 So, in my opinion, this is actually to
7 Dr. Haysbert's benefit because there is at least now a
8 chance to get some of these constant procedural and rule
9 problems straightened out without there being basically a
10 change in -- doesn't change the liability issues, it doesn't
11 change the causation issues, and it doesn't change the
12 damages issues, but at least you can get the case in order
13 to go forward.

14 So, again, I reserve the opportunity to reduce this
15 to writing, and I think that this at least gives an
16 opportunity for the plaintiff to go forward in a timely,
17 organized matter under the Federal Rules of Evidence and
18 procedure and the local rules of this court and the law.

19 What the Court is requiring at this point is that,
20 number one, plaintiff, through Mr. McKelvey, he's still in
21 the case as local counsel, he's agreed to stay in the case
22 as local counsel. I specifically asked him that earlier.
23 He has 21 days to notify the Court if a new trial date
24 should be set.

25 The Court will direct that any new trial be

1 re-assigned to another judge of this Court with a new jury.
2 That judge can also determine how to handle Dr. Filler's
3 testimony, since it would be going before that judge, and
4 decide the causation question, which I frankly have great
5 reservations about, and the admissibility of the work
6 orders, and the remedial issues. I would prefer that the
7 judge who is going to handle this trial be the one to make
8 the rulings on Dr. Filler, which have been briefed, and the
9 remedial issues that are taking place.

10 If plaintiff for some reason desires to secure new
11 local counsel, I don't know what her relationship is, it's
12 hard to tell, but what the plaintiff's relationship is with
13 Mr. McKelvey, but he said he's willing to proceed, and if
14 she's willing for him to proceed, then that's the way it is
15 at this point. He would not be able to remove himself from
16 the case without permission from a judge of this Court and
17 without the plaintiff's agreement to it.

18 But he is the one responsible at this juncture for
19 notifying the Court within 21 days if a new trial date is
20 sought. If it is not, then the case would be dismissed from
21 the Court's docket. I would say that the Court, as I said,
22 will direct that any new trial be assigned to another judge
23 of this Court, and any newly assigned judge can determine
24 any withdrawal of local counsel and any *pro hac vice* motions
25 that may come before the Court for any new trial.

1 Any delay will allow, as I said, for proper
2 preparation. Facts, causation, and damages claims for
3 plaintiff do not change.

4 Neither counsel, and I would say this strongly
5 because the jury will be told this, and this is certainly
6 evidence for extreme sanction by the Court, our local rules
7 do not allow any attorney or anyone on their behalf to
8 communicate with any juror in the case. Are you familiar
9 with that rule, Mr. McKelvey?

10 MR. MCKELVEY: Yes, Your Honor.

11 THE COURT: I'm telling you that rule now that you
12 may not, you were admitted for a limited purpose, and it was
13 before this jury, and you and no one on your behalf may
14 contact these jurors, and if you do, the jurors have been
15 instructed that if any attorney that appeared in this case
16 while they were jurors, or anyone on their behalf, should
17 contact them -- I don't know what you do in California, but
18 here we don't allow it.

19 So if you contact them, they will immediately
20 notify the Court, and you need to be aware of that and the
21 seriousness with which that conduct is viewed by the Eastern
22 District of Virginia.

23 Mr. McKelvey, are there any questions about the
24 Court's instructions going forward?

25 MR. MCKELVEY: Your Honor, let me, is it okay if I

1 repeat what I have down just to be sure that I'm correct on
2 everything the Court said?

3 THE COURT: Sure. Let me go to my page.

4 MR. McKELVEY: Yes, ma'am.

5 THE COURT: Let me go to the page where I've got it
6 all written out.

7 MR. McKELVEY: Yes, ma'am.

8 THE COURT: I think I can still read it. I'm not
9 sure anybody else can. Give me a minute.

10 MR. McKELVEY: Yes, ma'am.

11 THE COURT: All right.

12 MR. McKELVEY: Thank you, Your Honor. First one
13 is, plaintiff has 21 days -- these are just paraphrased.

14 THE COURT: That's fine.

15 MR. McKELVEY: Plaintiff has 21 days to notify the
16 Court if a new trial -- if she seeks a new trial in this
17 case.

18 THE COURT: Any trial date should be set.

19 MR. McKELVEY: Yes, ma'am. If a new trial date
20 should be set. If so, then, again, just paraphrasing,
21 different judge and jury, obviously different jury but be
22 referred to a different judge, and that judge will rule on
23 the motions regarding Dr. Filler and subsequent remedial
24 measures.

25 THE COURT: Yes, sir.

1 MR. McKELVEY: Three, plaintiff can obtain other
2 counsel but only -- I can withdraw if the plaintiff wants me
3 to, but she has to have other local counsel prior to that
4 withdrawal, is more or less how I took that.

5 THE COURT: Yes.

6 MR. McKELVEY: Any motions regarding that issue
7 will be taken up with the new judge, if it's obviously a new
8 trial sought. Facts, claims and causation issues are going
9 to be the same for the plaintiff, and then no communication
10 with the jury.

11 THE COURT: Yes.

12 MR. McKELVEY: Thank you, Your Honor.

13 THE COURT: Mr. McGavin, do you have anything else?

14 MR. McGAVIN: Your Honor, I assume it will take a
15 few days to prepare the opinion?

16 THE COURT: I'll endeavor to get it out by the end
17 of August, hopefully in the next couple of weeks.

18 MR. McGAVIN: That brings me to the 21-day deadline
19 on making a decision by selecting a new trial date. Does
20 the 21 days begin with entry of the order or does it run
21 from today?

22 THE COURT: It can begin with entry of the order.

23 MR. McGAVIN: So when we receive the memorandum
24 opinion, that's when the 21 days begins?

25 THE COURT: I think you could make it before then,

1 but, yes, because I put pretty much everything on the
2 record, but I'll let the 21 days be from when the Court
3 issues the order.

4 MR. MCGAVIN: Thank you, Your Honor. Then, as to
5 the status of the 26(a) disclosures.

6 THE COURT: Wait just a minute.

7 MR. MCGAVIN: Your Honor, the second issue relates
8 to the 26(a) disclosures. There will be no new 26(a)
9 disclosures? Those are locked in where they were, is that
10 what the Court was saying?

11 THE COURT: A new judge can take that up.

12 MR. MCGAVIN: Thank you, Your Honor.

13 THE COURT: As far as I'm concerned, any of these
14 issues, I said I would reduce this to writing, so I'm
15 hesitant on that because my mistrial ruling is final. Well,
16 it's really an interlocutory ruling under the law, but if
17 you look at the case law, it is. I don't know why it would
18 take more than 21 days. I have made my ruling from the
19 bench.

20 Mr. Haysbert is disqualified as *pro hac vice*
21 counsel in this case and on your motion, and for the reasons
22 I said, and the mistrial has been declared, and the jury is
23 being sent away. I think it can go either way whether the
24 21 days runs from today or from when I get the order out,
25 because one way or the other, whether it's considered today,

1 I don't know what more information they need to decide. I'm
2 not going to sit here and straighten out things that may
3 have to be taken up. I would assume there are no further
4 26.

5 MR. MCGAVIN: Thank you, Your Honor.

6 THE COURT: I would assume there are no further
7 such designations, and I would assume that the claims in the
8 case can't change, but I'm not making any ruling past a
9 mistrial or past disqualification of Mr. Haysbert.

10 MR. MCGAVIN: Thank you, Your Honor.

11 THE COURT: The question of Ms. Deajah Clark is now
12 moot, but I would put on the record as an exhibit in this
13 hearing that this subpoena is signed by Mr. Haysbert on
14 August 10th directing Ms. Clark to be before me in this
15 court on August 11 and 14 between 10:00 and 6:00 p.m. It
16 was served by Ms. Donaldson on 8-11-2023 at 2:20 p.m. on
17 8-11-23 to Ben Mayo, a manager. I assume that's the manager
18 that she talked about for the Roadhouse, and that is what
19 she has given as the proof of service. It just came through
20 from the case manager to the Court. We will make that the
21 next exhibit, Ms. Armstrong, and I have one more question
22 for you.

23 I just wanted to clear up one other matter. Here
24 is the Deajah Clark, and that should be an exhibit. I will
25 let your 21 days run from when I issue the order. That will

1 give you more time, Mr. McKelvey, to discuss the matter with
2 Dr. Haysbert and how she wants to proceed. So I don't see
3 that as a major delay. The 21 days will run from the time I
4 issue the written order, and that will be in the written
5 order, the 21 days from the date of this order. So that
6 will be the effective date of it for complying, will be from
7 the date of that order.

8 The other thing is, I just asked Ms. Armstrong
9 about the paper exhibits. She says that she communicated
10 that to local counsel. She's communicated that to
11 Mr. McKelvey. So, apparently, again, there must have been a
12 lack of communication as between the *pro hac vice* counsel
13 and local counsel. So that's all that she said, is that she
14 did communicate it to Mr. McKelvey. It wasn't communicated
15 to Mr. Haysbert. But that doesn't excuse that there was an
16 arrival there without the exhibits and that there had been
17 no request for electronic equipment to be brought into the
18 courthouse and approved by the Court when you arrived with
19 computers, and all of those rules are on the website.

20 Then, I will endeavor to get this written opinion
21 out as quickly as possible, and the Court stands in recess
22 until tomorrow at 11:00 a.m.

23 I would tell you, Mr. McKelvey, if you want to be
24 here, Mr. McGavin, if you want to be here, the jury is going
25 to be dismissed tomorrow. I don't know whether you want to

1 be here or not. All it is going to be is dismissed and told
2 the rule by the clerk that they can't talk to anybody.

3 MR. MCGAVIN: Your Honor, if I may be excused, I
4 would prefer not to be here.

5 MR. MCKELVEY: I would request the same thing.

6 THE COURT: I will excuse you both. I think that
7 would be a further expenditure of your time that's
8 unnecessary for your clients.

9 MR. MCGAVIN: Thank you, Your Honor.

10 MR. MCKELVEY: Thank you, Your Honor.

11 THE COURT: Then the Court stands in recess until
12 tomorrow.

13 (Hearing adjourned at 5:18 p.m.)

14 CERTIFICATION

15

16 I certify that the foregoing is a correct transcript
17 from the record of proceedings in the above-entitled matter.

18

19

20 X_____/s/_____
21 Jody A. Stewart

22

23 X____8-27-2023_____
24 Date

25